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SUMMARY RECORD OF THE 39th MEETING

Chairman: Mr. ESCOVAR-SALOM (Venezuela)

later: Ms. WONG (New Zealand)
(Vice-Chairman)

CONTENTS

AGENDA ITEM 114: PROGRAMME PLANNING (continued)

AGENDA ITEM 120: HUMAN RESOURCES MANAGEMENT (continued)

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued)

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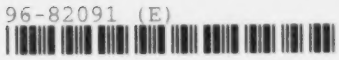

The meeting was called to order at 3.10 p.m.

AGENDA ITEM 114: PROGRAMME PLANNING (continued)

Programme 4 (Legal affairs) of the proposed medium-term plan for the period 1998-2001 (A/C.6/51/8 and Add.1)

1. The CHAIRMAN recalled that, in a letter dated 26 September 1996 (A/C.6/51/2), the Chairman of the Fifth Committee had requested the views of the Sixth Committee on programme 4 (Legal affairs) of the proposed medium-term plan for the period 1998-2001. Following consultations with the other officers of the Committee, he had transmitted to the chairmen of the various regional groups copies of that letter and of the relevant section of the medium-term plan, requesting the regional groups to transmit their views to him by 11 November. Comments had so far been received from a number of States, namely, Austria, Belgium, Costa Rica, Cuba, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom, and were reproduced in document A/C.6/51/8 and Add.1, which was before the members of the Committee. He took it that the Sixth Committee wished to transmit those comments to the Chairman of the Fifth Committee.

2. It was so decided.

AGENDA ITEM 120: HUMAN RESOURCES MANAGEMENT (continued)

Reform of the internal system of justice in the United Nations Secretariat (A/C.6/51/7)

3. The CHAIRMAN recalled that on 1 October, the Committee had concluded its consideration of the item, and had requested the representative of Ireland, Ambassador Hayes, to coordinate the Sixth Committee's communication on the subject to the Fifth Committee. Following consultations with the regional groups, the representative of Ireland had transmitted the communication contained in document A/C.6/51/7, which was before the members of the Committee. He took it that the Sixth Committee wished to transmit that document to the Chairman of the Fifth Committee.

4. It was so decided.

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued) (A/51/10 and Corr.1, A/51/332 and Corr.1, A/51/358 and Add.1 and A/51/365)

5. Ms. WONG (New Zealand), referring to chapter V of the report of the International Law Commission (A/51/10), said that the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law deserved close consideration. The expanded scope of the articles suggested that the consequences of harm could be extended to activities not involving risk; in that connection, her delegation endorsed the comment made by Sweden on behalf of the Nordic countries that it was

important not to undermine the "polluter pays" principle. The governing principle of international law in that area was Principle 2 of the Rio Declaration on Environment and Development, according to which States had the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

6. Until States had had an opportunity to express their views on the draft articles, it would be premature to take any other decisions on the future of the topic. Her delegation therefore encouraged the Commission to continue its work with a view to completing the first reading of the draft articles, and noted with satisfaction that the Commission had achieved results by using the working group format.

7. In the light of the recent proliferation of forums in which new treaties were being developed, the topic of environmental law should remain on the Commission's long-term programme of work, although it might be necessary to focus on manageable aspects of the topic.

8. As to the discussion of the agenda item in the Sixth Committee, which tended to be rather formalized, her delegation would support proposals to structure the debate so as to make it more action-oriented.

9. Mr. BIGGAR (Ireland), referring to chapter IV of document A/51/10, recalled that the topic of State succession had from the outset elicited a cautious response from the international community, owing to both the complexity of the topic and doubts as to its urgency.

10. His delegation welcomed the reports of the Special Rapporteur on the topic (A/CN.4/467 and A/CN.4/474) and endorsed the recommendation in paragraph 75 of document A/51/10 that the Commission and the Sixth Committee should limit their consideration to the nationality of natural persons, leaving aside, for the time being, the problem of the nationality of legal persons.

11. His delegation also endorsed the Special Rapporteur's view that the study which the Commission was to prepare must address separately the problems of nationality arising in the context of different types of territorial changes. It would be appropriate to retain the categories which the Commission had adopted for the codification of the law of succession in respect of matters other than treaties, rather than those which it had adopted for succession in respect of treaties.

12. Ireland further agreed with the Special Rapporteur that, while nationality was essentially governed by internal law, international law imposed certain restrictions on the freedom of action of States.

13. Since the conclusion of the Commission's most recent session, the Council of Europe's Commission for Democracy through Law had adopted an important declaration on State succession and its impact on the nationality of natural persons. That declaration, which emphasized the relevance to the issue of the principles of democracy, the rule of law and the protection of human rights, recognized that, in cases of State succession, the interests not only of States

but also of individuals must be taken into account, and provided that any deprivation or withdrawal of nationality or refusal to confer nationality must be subject to an effective remedy, could provide useful guidance for the Commission in its future work on the topic.

14. Mr. YÉPEZ (Venezuela), referring to chapter IV of document A/51/10, emphasized the importance of the item, which reflected the strengthening of the Commission's work in the area of State succession.

15. As to the indication in paragraph 77 of the report that the Special Rapporteur was in favour of elaborating a declaration of the General Assembly accompanied by commentaries, his delegation believed that it was premature to decide on the form which the outcome of the work might take, as the rights and obligations of States and individuals arising under the provisions to be drafted had yet to be determined.

16. His delegation endorsed the idea of dividing the future instrument into two parts, one dealing with general principles concerning nationality in all situations of State succession, and the other with rules for specific situations of State succession. Part I should include a provision enabling individuals to make use of all appropriate administrative or judicial appeals in order to obtain recognition by the States concerned of the nationality to which they felt themselves to be entitled, and stipulating that such appeals must be acted upon promptly.

17. Similarly, with regard to paragraph 86 (j) of the report, concerning the obligation to adopt all reasonable measures to enable a family to remain together or to be reunited, his delegation believed that consanguinity should be the determining factor in the acquisition of nationality. In any event, the right to a nationality was inherent in the human person and must be subject to international regulation, but without prejudice to the right of a State to determine who was entitled to its nationality.

18. The Venezuelan delegation attached priority to the topic of international liability for injurious consequences arising out of acts not prohibited by international law and commended the working group on its report. The draft articles would fill a gap in international law at a time when the risk of harm was increasing, intensifying the need for affected States and individuals to be provided with remedies.

19. As to whether the scope of the draft articles should be expanded, his delegation believed that the main thing was that the injured parties must be able to obtain compensation or other relief, regardless of whether the activity had involved a risk of causing harm. The consequences of the harm must be compensated, and the State in whose territory the harm originated must assume its responsibility, in accordance with the principle that a State was responsible for everything occurring in its territory and affecting other States. That did not rule out the civil liability of individuals. It would be useful to include a merely illustrative list in article 1, for it would then be easier to oblige States to take preventive measures with regard to the listed activities and substances. It was clear that the liability of a State would be increased if it had not taken or had violated preventive measures.

20. Chapter III of the draft articles, on compensation and other relief, contained the elements essential to documents such as the draft articles. However, an effort might be made to go a little further with respect to the obligation to negotiate by including requirements to conclude an agreement with the affected State or individuals and to make effective compensation, on the assumption that at a later stage a dispute-settlement mechanism would be provided in order to enforce the obligation.

21. The Venezuelan delegation believed that both the compensation procedures should be retained as alternative means of recourse. However, some points in articles 20 and 21 required clarification, including the way in which injured individuals could trigger the negotiations between States or participate in them. It might also be useful to include in article 22 a reference to the means by which the State of origin had notified the risk of significant transboundary harm, for that factor might affect the degree of liability.

22. His delegation welcomed the Special Rapporteur's second report on the topic of reservations to treaties. The rules on reservations contained in the existing treaties were fairly comprehensive although some difficulties still occurred. It might in fact be useful to establish a special regime for reservations to human rights treaties and to clarify the definition of the "object" of a treaty, with a view to determining the admissibility of reservations. In any event, the topic required further study, and the draft resolution proposed in the report was therefore premature.

23. Mr. BAENA SOARES (Brazil) said that, with regard to the topic of State succession and its impact on the nationality of natural and legal persons, his delegation agreed that the nationality of natural persons should be discussed separately from that of legal persons and given priority. The topic had implications for relations among States, particularly in the regions where borders had recently been redrawn, and touched on an individual right of great significance. The preparation of an authoritative text would benefit from submissions by States describing practical problems encountered, and the text must ensure that individuals were not threatened in their fundamental human right to a nationality. His delegation also agreed that the text should take the form of a declaration of the General Assembly, or perhaps separate declarations on the two categories of nationality.

24. The principles set out in paragraph 86 of the Commission's report would require further examination, and the text on the principle of non-discrimination would certainly have to be redrafted. In an age marked by the resurgence of intolerance it was imperative to prevent prejudice from playing any role whatsoever.

25. Turning to international liability for injurious consequences arising out of acts not prohibited by international law, he said that the Chairman of the Commission had been right to draw the Committee's attention to the assertion of the International Court of Justice in its advisory opinion on the legality of the threat or use of nuclear weapons that respect for the environment of other States was now part of international environmental law. It was natural that the commentaries to the draft articles should make frequent reference to the Rio Declaration on Environment and Development and to other multilateral

environmental instruments, and the obvious linkages between the present topic and the topic of the non-navigational uses of international watercourses underlined the fact that environmental issues had come to the top of the international agenda.

26. The Brazilian delegation did not share the doubts as to whether the draft articles ought to apply to activities not prohibited by international law which did in fact cause significant transboundary harm even though they did not at the relevant time involve a risk of doing so. The paramount consideration should be to deal with situations where significant harm had been caused, regardless of whether the activity giving rise to the transboundary harm involved any risk. Article 1 was sufficiently broad and need not be supplemented by a list of activities or substances. The obligations of prevention were dealt with at length in the draft articles and should perhaps be balanced by a more detailed treatment of compensation and other relief. The victims of transboundary harm should not be left to bear the entire loss and should be compensated. The two approaches envisaged in chapter III seemed adequate, although insufficient attention was given to the manifold aspects of compensation. Essential matters relating to the nature of the liability or compensation measures should be elaborated in greater detail, for they were the crux of the proposed instrument.

27. It was clear that any proposals on the topic of reservations to treaties should preserve the achievements of the three Vienna Conventions, but there was scope for clarifying and filling out the relevant provisions. There were no convincing grounds for a separate regime applicable to human rights treaties. The Commission should seek generally applicable rules on reservations to treaties, regardless of their nature or purpose. That did not rule out the elaboration of principles to eliminate the present uncertainties, as suggested in the draft resolution set out in the note to paragraph 137 of the report.

28. Ms. WILLSON (United States of America) said that the United States Government maintained its reservations about the Commission's work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. It urged the Commission to take the concerns of Governments into account in the planning of its future work.

29. In seeking to fuse concepts of environmental impact assessment and liability the Commission had raised difficult issues. Moreover, existing agreements showed the need for liability regimes closely tailored to particular activities. It was not feasible or even necessarily desirable to establish a single regime for all cases, and certainly not a binding one. The future work should be focused on areas which had some chance of commanding consensus, with a view to producing a set of recommended principles for practices rather than a multilateral convention. The draft articles would obligate States to establish an environmental impact assessment process for virtually all activities which might cause significant transboundary harm and they implied State liability for all such harm. That was not acceptable to the United States. The Commission should narrow its focus and limit the topic to particularly hazardous activities. The regime should promote international cooperation and negotiation rather than impose binding obligations to assess risks and provide compensation or other relief.

30. The Commission had asked four specific questions, which her delegation wished to address. Firstly, the scope of the draft articles should not be broadened: article 1 (a) was already too broad. To impose liability (article 5) for all legal activities which involved any risks of significant transboundary harm made the proposal unmanageable; any extension of the regime was beyond contemplation. If the topic was limited to particularly hazardous activities, it might be useful to produce a merely illustrative list of such activities. An additional problem was that article 1 (a) did not define "activity"; the text would seem to apply even to legitimate economic or development policies. Furthermore, article 2 (b) defined "transboundary harm" essentially without limits; the formulation should be limited to physical and attendant economic harm.

31. Secondly, the liability regime should not be extended to address compensation and other relief with regard to States which did not take preventive measures. It was going too far to require States to provide compensation for all sorts of significant transboundary harm. It was going even further to propose State responsibility for violation of preventive measures.

32. Thirdly, with respect to the definition of "compensation or other relief" article 5 was very ambiguous, for it left open the question of precisely who or what was liable. If the draft articles were meant to be the basis of a treaty, it might be assumed that they imposed obligations only on States and not on private entities. Under customary international law States were not generally liable for transboundary harm caused by private entities. The best way to minimize such harm was to assign the costs to the person or entity causing it and not to the State. Her delegation endorsed the principle contained in article 20 that States should not discriminate in providing access to their judicial systems for those seeking relief from transboundary harm, but that did not compel States to provide such access or to provide access for individuals claiming transboundary harm identical to the access provided in respect of harm occurring in the State of origin.

33. Fourthly, both of the alternative procedures by which injured parties could seek remedies must be left open. It might sometimes be appropriate for victims to seek redress through the systems of the State of origin; in other circumstances State-to-State negotiations might be best.

34. Mr. HILGER (Germany), speaking on chapter VI of the report of the International Law Commission (A/51/10), welcomed the emerging consensus that there should be no fundamental change in the "Vienna regime" already in force. Nevertheless, the Commission should draft articles that would serve as a guide on State practice concerning reservations to treaties, accompanied, if necessary, by model clauses. The underlying question of the unity or diversity of the legal regime of reservations to treaties was not new. He was aware of the opinion held by some international lawyers that the "Vienna regime" should not apply to human rights instruments, but felt that other normative treaties should probably be regarded as equally important in view of their universal application. Bearing in mind that a satisfactory regime should balance the contradictory goals of achieving broad participation in the treaty and preserving its essence, he said that the "Vienna regime" provided for a maximum of flexibility and adaptability and was therefore applicable to all treaties,

regardless of their nature or object. The issue concerned not only evaluation of the permissibility of reservations in the light of the object and purpose of the treaty, but also preservation of the freedom of other contracting parties to agree to reservations through a mechanism of acceptances and objections. He shared the view that the right to formulate reservations was of a residual nature and thought it advisable that, when negotiating multilateral treaties, States should pay special attention to the permissibility of reservations and to the consequences of reservations where permissibility was doubtful or excluded.

35. The permissibility of reservations was now subject either to traditional monitoring by the contracting States and by courts in dispute settlement procedures or by human rights treaty monitoring bodies, which had acquired great significance at both regional and international levels. His Government, however, shared some of the criticism voiced in the Sixth Committee in 1996 concerning General Comment No. 24 of the Human Rights Committee (CCPR/C/21/Rev.1/Add.6). In his view, monitoring bodies had competence to examine the significance of reservations in so far as it was necessary for their own work. Such verification of the permissibility of reservations was a positive element. States, however, were free to form their own judgement and to decide on reactions to reservations which were deemed impermissible. In that connection, his delegation supported the conclusion reached by the Special Rapporteur that it was the exclusive responsibility of States to rectify any defect by opting to withdraw or amend the impermissible reservation or to withdraw from or refrain from becoming a party to the treaty. However, the principle whereby a State could not be regarded as a party to a treaty if its reservation was incompatible with the object and purpose of that treaty posed practical difficulties; whereas the test of incompatibility should be objective, State practice differed. The Commission should therefore clarify the uncertainty of the current regime in that respect, and he hoped that it would devote substantial time to the topic at its next session. The reports and draft resolution of the Special Rapporteur merited close attention and he looked forward to his further reports on other important issues concerning the regime of reservations to treaties, in which connection he pledged his full cooperation.

36. Ms. Wong (New Zealand), Vice-Chairman, took the Chair.

37. Mr. LAVALLE VALDÉS (Guatemala) said that he wished to comment on the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (A/51/10, chap. V), particularly on the definition of the "risk of causing significant transboundary harm", contained in article 2 (a), which was a central element of article 1. His delegation objected to the definition because the phrase quoted could only be understood when read in conjunction with paragraph (22) of the commentary to article 1, where it was noted that the concept of risk was interpreted as "appreciation ... which a properly informed observer had or ought to have had". His delegation therefore believed that that interpretation limiting the concept of risk should be added to draft article 2 (a), especially if article 1 (b) was to be deleted.

38. However, for article 2 (a) to be fully understood, it had to be read not only in the light of paragraph (22) of the commentary to article 1, but also in the light of paragraph (3) of the commentary to article 2. In view of the

explanation in the final sentence of the latter, article 2 (a) could be improved if it was amended to read as follows: "'risk of causing significant transboundary harm' means any risk on a spectrum ranging from that which involves a high probability of causing significant harm to that which involves a low probability of causing disastrous harm".

39. His delegation doubted the usefulness of article 3. The first sentence of the article was too general as, taken literally, it could cover any activity carried out by a State. The text could be improved if the word "activities" was replaced by "activities referred to in article 1". The second sentence, up to the comma, was unnecessary as it duplicated article 4; and the remainder of the sentence was superfluous. Article 3 could therefore be totally eliminated or amended and placed in the introduction to the convention.

40. The words "all appropriate measures" appeared in article 4, whereas in article 22 (b) the term "due diligence" was used. The same expression should be used in both articles. At the end of article 4, the words "to minimize its effects" should be replaced by "to minimize and if possible eliminate its effects"; the relevant part of article 6 should be changed accordingly.

41. Article 8 should be deleted as its meaning was unclear and the corresponding commentary failed to provide clarification.

42. Mr. ŠMEJKAL (Czech Republic), referring to chapter IV of the Commission's report, on State succession and its impact on the nationality of natural and legal persons, said that, as the Czech Republic had recently had to deal with such problems, his delegation believed it highly desirable to have a clear vision of the corresponding positive international law.

43. His delegation supported the Commission's proposal to give priority to the issue of the nationality of natural persons, which had a human rights dimension; the issue of legal persons could be examined at a later stage. In a case of State succession, the nationality of natural persons should be considered from a very concrete and practical point of view. He welcomed the Commission's proposal that Member States should present their experiences, as specific cases could illustrate the effects of succession and guide the Commission's future work.

44. There was a lack of positive international law on the subject of nationality in the case of State succession because nationality was indisputably governed by national law, in the first place. When a territory changed its status, international law on nationality intervened essentially through a few basic principles, whose legal scope was relatively unclear at the current time; therein lay the interest of the Commission's work. His delegation believed that the statement of such basic principles, including non-discrimination, effectiveness, and consultation and negotiation in order to avoid statelessness, would fit well into the format suggested by the Commission.

45. His delegation noted that it was suggested that the future instrument should be divided into two parts. The first part, setting out the principles to which he had just referred, would be non-binding and reflect customary law with the corresponding legal consequences. The second part would contain specific

rules for the granting or withdrawal of nationality or the granting of the right of option, and would offer a complete range of solutions in the form of model rules.

46. As to the content of the proposals in question, particularly those set out in paragraph 86 of the Commission's report, his delegation noted that the proposals reflected the principles relating to the conduct that States should adopt with regard to the nationality of natural persons in the case of succession. It would state its position at a later stage, once the text of the draft articles was available.

47. With regard to chapter V of the Commission's report, on the international liability for injurious consequences arising out of acts not prohibited by international law, he noted that although the first reading of the draft articles on the topic had not been completed during the Commission's session, a working group had been set up to review the work already done. The Commission's further work on the complex subject would depend greatly on the choice made as to the scope of the articles. The Commission should adopt a prudent and modest approach, and exclude activities not involving risk. The issue of a State's obligations in the case of harm caused by lawful activities and that of strict liability were complex and controversial even in the narrow framework of activities involving risk, and the addition of activities not entailing any risk at all would make progress even more difficult. The very concept of an activity not entailing any risk implied that the possibility of causing harm could not be anticipated; therefore, none of the matters relating to prevention, contained in chapter II of the draft articles and also part of chapter I, would be applicable. His delegation believed that strict liability should be based on the concept of risk.

48. Turning to the topic of reservations to treaties (A/51/10, chap. VI), he said that the Special Rapporteur's second report (A/CN.4/477 and Add.1) was excellent. His delegation endorsed the Special Rapporteur's conclusions and the draft resolution proposed by him. The conclusions recommended the unity of the legal regime of reservations and the full application of the "Vienna régime" to human rights treaties. His delegation reaffirmed its position that reservations to treaties formed an integral part of the consent expressed by States.

49. Mr. AL-BAHARNA (Bahrain), referring to the topic of reservations to treaties, dealt with in chapter VI of the Commission's report, said that States would continue to assert their right to formulate reservations with respect to multilateral treaties to which they wished to become parties. No one could contest that right. It was doubtful whether so many States would have become parties to the multilateral convention adopted under the aegis of the United Nations if they had not been able to formulate reservations. The reservations regime established by the 1969 Vienna Convention on the Law of Treaties had served the international community well; however, certain clarifications and improvements were in order.

50. With regard to whether reservations should be examined from the point of view of "permissibility" or "opposability", the pragmatic approach of the Vienna Convention of 1969 should be followed. Article 2 paragraph 1 (d) of that Convention was sufficiently clear regarding the definition of a reservation.

51. Where a treaty specifically prohibited reservations by the parties, a State party should be dissuaded from using an interpretative declaration as a disguised reservation. Interpretative declarations were in no way equal to reservations; they should be clearly defined and distinguished from valid reservations formulated under the provisions of the 1969 Vienna Convention. The Commission should seek guidance from the provisions of the Convention on the Law of the Sea and other treaties containing provisions relating to both reservations and declarations.

52. The issue of reservations to human rights treaties should be treated more carefully since it was subject to unavoidable controversies. The question arose of whether a State party to a human rights treaty could be prevented from making a reservation to certain provisions of that treaty.

53. With respect to the problems of the formulation and withdrawal of reservations, acceptances and objections, his delegation agreed with the Special Rapporteur that the problems arising from the application of article 20, paragraphs 2 and 3, of the 1969 and 1986 Vienna Conventions and other developments in that regard should be included in a "guide to practice in respect of reservations".

54. Regarding the fate of reservations, acceptances and objections in the case of succession of States, such a "guide to practice" should cover problems relating to other categories of State succession, because the 1978 Vienna Convention dealt only with reservations of a newly independent State.

55. His delegation supported the trend towards the non-inclusion of a dispute settlement clause in the "guide to practice". However, it had no objection to the inclusion of dispute settlement mechanisms in the outline of the study proposed by the Special Rapporteur. It could enable the Commission to reflect on the question of the appropriateness of establishing dispute settlement mechanisms linked to the reservations regime. Moreover, his delegation supported the general outline of the study, as set out in the Special Rapporteur's second report, subject to the comments he had just made.

56. His delegation agreed in general with the ideas expressed in the draft resolution proposed by the Special Rapporteur, particularly in paragraph 8. However, the Commission did not need to adopt a draft resolution for submission to the General Assembly. Instead, the ideas and principles contained in the draft resolution should be submitted to the General Assembly in the form of recommendations or draft articles to be included in the Commission's future reports, as was usually the case.

57. Mr. SZÉNÁSI (Hungary), speaking on all chapters of the Commission's report, said his delegation supported the Commission's attempt to limit the scope of the draft Code of Crimes against the Peace and Security of Mankind to those categories of crimes whose inclusion enjoyed the widest support of Governments. He agreed with the Commission that the exclusion of certain crimes did not affect their status under international law, and supported its efforts to harmonize the draft with the views expressed in the Preparatory Committee on the Establishment of an International Criminal Court. However, there did not appear to be general support for the inclusion of the crime of aggression, and, indeed,

the Commission itself had noted the problems of defining aggression as an act committed by a State in its commentary. He agreed with the Commission's decision to retain the definition of genocide contained in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. He was satisfied with the definition of crimes against humanity, which was based on the notion that there was no nexus between that category of crimes and a state of war, and was especially pleased that institutionalized discrimination on racial, ethnic or religious grounds was included in that category. He welcomed the inclusion in the category of war crimes of acts committed in non-international armed conflicts, and of the use of methods or means of warfare with the intent to cause severe damage to the environment. He also welcomed the inclusion in the draft Code of crimes against United Nations and associated personnel. As to the form the draft Code should take, his delegation believed that it should be incorporated in the statute of an international criminal court, provided that doing so would not unduly delay completion of the work.

58. State responsibility was a complex topic, and important questions such as countermeasures, proportionality and dispute settlement had proved particularly problematic. The draft articles, whose eventual adoption would represent a major breakthrough in the codification and progressive development of international law therefore needed to be very thoroughly examined. His delegation agreed with the Commission that they should be transmitted to Governments for comment and observations, which should be submitted to the Secretary-General by 1 January 1998.

59. State succession and its impact on the nationality of natural and legal persons was a particularly important political and legal issue for countries in Central and Eastern Europe. He agreed with the Special Rapporteur that the Commission should continue to focus on the nationality of natural persons to begin with, while acknowledging that there were links between the impact of State succession on natural persons and its impact on legal persons. His delegation agreed with the general thrust of the recommendations of the Working Group contained in paragraphs 80 to 87 of the report, but was uneasy about the recommendation on the form the instrument might take; he did not see how a declaration of the General Assembly could consist of articles with commentaries. Careful thought had to be given to the form of the instrument, bearing in mind its main objectives.

60. The draft articles on international liability for injurious consequences arising out of acts not prohibited by international law represented a substantial advance in the work on the topic, but he did not agree that the nature of the draft articles should be residual in character, as suggested in the commentary to draft article 8. While he agreed with the principle that States should not be precluded from carrying out activities not prohibited by international law, he wished to stress that the freedom of action of States was not unlimited; in particular, there was an obligation to prevent or minimize the risk of causing significant transboundary harm, as emphasized in draft articles 3 and 4. He welcomed the inclusion of draft article 5, on liability, and commended the Commission for taking into account Principle 22 of the Declaration of the United Nations Conference on the Human Environment and Principle 13 of the Rio Declaration on Environment and Development. Draft article 17 was particularly important, with its obligation to enter into

consultations in order to prevent or minimize the risk of transboundary harm. He agreed with the general thrust of article 21, which obliged all States concerned to negotiate and take into account the factors referred to in article 22. However, he disagreed with the view expressed in the commentary to article 21 that the principle that the victim of harm should not be left to bear the entire loss, implied that compensation or other relief might not always be full. That so-called principle could be used as a pretext to victimize neighbouring States by carrying out activities which caused significant transboundary harm.

61. The Special Rapporteur on the topic of reservations to treaties had earlier put forward some very convincing views on the application of the relevant Vienna Conventions to human rights treaties, but the Hungarian delegation had unfortunately not yet had the time to consider the Special Rapporteur's second report.

62. His delegation endorsed the conclusions reached by the Commission in its examination of its procedures and working methods. A strict distinction between the codification and the progressive development of international law had proved unworkable, and the Commission had rightly chosen a pragmatic approach based on a composite idea of codification and progressive development. While the Commission should continue to focus on public international law, it should nevertheless continue to follow closely developments in private international law. The risk of fragmentation in international law and practice identified by the Commission should be counteracted by cooperating more closely with bodies with a special law-making mandate, such as the Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space, and institutions such as the Commission on Human Rights or the United Nations Environment Programme. More attention should also be paid to the activities of non-governmental scholarly bodies, such as the International Law Association, and the regional consultative committees, as well as to the valuable activity of bodies connected with the Council of Europe which were active in promoting the application of international law.

63. The major issues which could be usefully addressed by the Commission in the coming years were the Commission's relationship with the General Assembly and other bodies, both within and outside the United Nations system, the role of the Special Rapporteur, and the possible revision of the statute of the Commission. As to the Commission's long-term programme of work, diplomatic protection and unilateral acts of States were particularly appropriate topics for codification and progressive development, but he thought that the issue of the ownership and protection of wrecks beyond the limits of national maritime jurisdiction would be more appropriately considered in the context of the review procedures of the relevant conventions and within the framework of the International Maritime Organization.

64. Mrs. ESCARAMEIA (Portugal), commenting on all chapters of the Commission's report, said that her delegation wholeheartedly supported the inclusion of crimes against United Nations and associated personnel in the draft Code of Crimes against the Peace and Security of Mankind. As to the form the draft Code should take, it could best be incorporated in the definitions of crimes in the statute of an international criminal court, to avoid having different legal

instruments dealing with the same subject. When defining crimes in the draft statute, the Preparatory Committee on the Establishment of an International Criminal Court should consider the draft Code as one of the fundamental documents.

65. Her delegation reserved its position on the question of State responsibility. Portugal's domestic legislation provided for the criminal responsibility of legal persons, including that of the State, and there were merits in developing the concept of international criminal responsibility, but the draft articles did not include specific consequences attached to a crime as opposed to a mere wrongful act. Her delegation favoured a legal regime that would minimize differences in the possibilities of taking countermeasures, since it attached great importance to the Commission's role in the progressive development of international law.

66. On the question of international liability for injurious consequences arising out of acts not prohibited by international law, she said that her delegation welcomed the emphasis on preventive action, in article 4 of the draft articles. It was crucial to retain article 1 (b), dealing with activities that did not normally entail risk but that nonetheless caused harm. Her delegation strongly endorsed article 5, concerning the duty to pay compensation, on the understanding that it applied to the environment. The dispute settlement mechanisms needed to be reinforced, and a clearer distinction needed to be made between situations that entailed strict liability and those that involved responsibility.

67. As to the question of State succession and its impact on the nationality of natural and legal persons, her delegation agreed that the nationality of natural persons should be dealt with separately from that of legal persons, and that the draft articles on the topic could take the form of a General Assembly resolution. With regard to the issue of reservations to treaties, she said that while there was no need to alter the principles enshrined in the relevant conventions, greater clarity was urgently needed. There should be only one regime for reservations, and it should include the doctrine of permissibility, so that reservations which were incompatible with the purpose of the treaty were immediately impermissible.

68. Turning to the subject of the Commission's long-term programme of work, she said that her delegation attached most importance to the items relating to unilateral acts of States, criteria for the recognition of States, Governments and territorial acquisitions, the law of the environment and the law of the sea, the last-mentioned being an area in which Portugal had shown a strong interest. Her delegation welcomed the proposal to carry out a preliminary study on the ownership and protection of wrecks beyond the limits of national maritime jurisdiction.

69. The forthcoming fiftieth anniversary of the Commission was an appropriate time to re-examine its methods of work and its relationship with other bodies. Her delegation favoured the use of shorter, more structured reports which, like the various questionnaires and reports of the special rapporteurs, should be circulated well in advance of the session. It believed that a 10-week session, split into two parts, would permit better attendance by Commission members,

facilitate the structuring of the Commission's work and encourage closer cooperation with delegations. Portugal was also in favour of delegations' legal counsellors attending some working group meetings. It strongly supported the more extensive use of working groups and the establishment of a permanent group of experts, to be elected by the members of the Commission. Her delegation would support the revision of the Commission's statute along those lines.

70. Mrs. MEKHEMAR (Egypt), speaking on chapter III of the Commission's report (A/51/10 and Corr. 1), on State responsibility, said that extreme caution should be exercised in dealing with the question of countermeasures, whose use should be controlled with a view to avoiding abuse by the injured State, particularly bearing in mind the differing resources and capabilities of States. It was also essential to ensure that the wrongdoing State did not take retaliatory measures, which would escalate the dispute. In that connection, her delegation believed that the provision on proportionality contained in article 49 of the draft articles on State responsibility was too general and therefore required further consideration. It also felt that the interim measures referred to in draft article 48, paragraph 1, should be defined in order to ensure that they remained distinct from countermeasures. The conditions for the adoption of interim measures should also be specified, as the absence of any form of control was unacceptable. She supported the linkage between countermeasures and the settlement of disputes; by taking a countermeasure, a State was indicating its prior consent to seeking a peaceful settlement. She therefore disagreed with the view that the provision whereby only the wrongdoing State could refer a dispute to arbitration was in breach of the rule which required the mutual consent of both parties to arbitration. The linkage between the two issues, however, should be deliberated further.

71. Draft article 19 contained no clear definition of an international crime. Moreover, it was not apparent whether the examples cited in article 19, paragraph 3, were exhaustive. While the responsibility arising out of a serious breach differed from that arising out of a less serious breach, the crucial issue was the nature of the obligation which had been breached. Draft article 19, however, did not specify the basis on which an obligation was deemed essential for the protection of fundamental interests of the international community. In her view, the criterion should be whether or not the breach violated a mandatory provision of international law. However, the problem of defining an international crime and an international delict still remained and was attributable to the choice of inappropriate terminology which had been borrowed from internal law. Further work was therefore required with a view to achieving a widely acceptable draft.

72. Turning to chapter V of the Commission's report on international liability for injurious consequences arising out of acts not prohibited by international law, she said that it would be difficult to achieve a universal legal system which covered liability and compensation for harm arising out of acts which were unspecified, particularly in view of the variety of activities and harm that were potentially involved. In that light, the emerging tendency, which she supported, was to deal with the subject according to the nature of the activity concerned. She therefore believed that the most suitable approach would be to formulate a non-binding declaration in line with current developments in international law that could serve as a guideline, whereas individual activities

could be the subject of special agreements. The declaration should also include guidelines for compensation. Her delegation agreed partially with the content of chapter III of the draft articles on the subject; while it was valid to assume that the affected State would seek remedy on behalf of its citizens in the case of wide-scale harm, the same did not apply where harm was limited. It disagreed, however, that relief should be sought through the courts of the State of origin, as practical and legal problems would result from the divergence of legal systems. She agreed with the content of draft article 21 concerning the nature and extent of compensation or other relief, although it should likewise be restricted to wide-scale harm or harm relating to the property, natural resources or environment of the affected State. She disagreed, however, with the factors stipulated in the article on the ground that a clear distinction should be made between State responsibility and the responsibility of the individual who carried out the activity concerned. Full or partial exemption should therefore be possible in exceptional circumstances, such as war or natural disaster.

73. She was in favour of the subjects chosen for future discussion, particularly diplomatic protection and unilateral acts of States. For practical reasons, she also endorsed the idea of dividing the work of the Committee into two sessions.

The meeting rose at 6.15 p.m.

UNITED NATIONS

General Assembly

FIFTY-FIRST SESSION

Official Records

SIXTH COMMITTEE
40th meeting
held on
Thursday, 14 November 1996
at 3 p.m.
New York

SUMMARY RECORD OF THE 40th MEETING

Chairman: Ms. WONG (New Zealand)
(Vice-Chairman)

later: Mr. ESCOVAR-SALOM (Venezuela)
(Chairman)

CONTENTS

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued)

AGENDA ITEM 151: MEASURES TO ELIMINATE INTERNATIONAL TERRORISM (continued)

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In the absence of Mr. Escovar-Salom (Venezuela), Ms. Wong (New Zealand), Vice-Chairman, took the Chair.

The meeting was called to order at 3.10 p.m.

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued) (A/51/10 and Corr.1, A/51/332 and Corr.1, A/51/358 and Add.1, A/51/365)

1. Ms. STEAINS (Australia), speaking on the issue of State succession and its impact on the nationality of natural and legal persons (A/51/10, chap. IV), said that her delegation agreed with the Working Group's recommendation to consider the nationality of natural persons and that of legal persons separately. The current political upheavals in many parts of the world and the widespread disintegration of States made it a matter of urgency to address the issue of State succession and the nationality of natural persons. She urged the Commission to complete the first reading of the articles on the subject at its forty-ninth or, at the latest, at its fiftieth session. Her delegation reserved its position on the form that the final outcome of the work in question should take, but leaned towards the idea of a non-binding declaration of the General Assembly consisting of articles and commentaries.

2. Turning to the topic of international liability for the injurious consequences of acts not prohibited by international law, dealt with in chapter V of the Commission's report, she said that her delegation supported the inclusion of article 1 (b) in the draft articles. Although it might seem onerous to impose liability on States for activities with unforeseen consequences, it would be more unjust to leave innocent States to bear the losses alone. Moreover, to impose liability for unexpected losses would provide an incentive for States to be particularly vigilant, and the foreseeability of risk was factored into the draft articles as an element to be considered in negotiations for compensation. The obligations with respect to prevention contained in chapter II of the draft articles should not be applied to activities under article 1 (b), but the obligations with respect to compensation contained in chapter III should be applied to them.

3. The availability of compensation through a specific international treaty should be another factor included in draft article 22. There were several comprehensive conventions in force covering damage caused by, for example, the carriage of oil or hazardous substances. Where exhaustive compensation regimes were provided, there was no need for further State compensation. Besides, many of the compensation and liability regimes, including the International Convention on Civil Liability for Oil Pollution Damage, contained provisions which ruled out further action if compensation was payable under a specific regime.

4. On the question of reservations to treaties, she said that her delegation considered that the legal regime governing reservations to treaties should be uniform, and that there should be no difference in treatment between reservations to human rights conventions and reservations to other treaties.

The issue of impermissible reservations was long overdue for study and needed to be examined very closely.

5. Mr. HAYES (Ireland) said that the long history of the Commission's consideration of the topic "International liability for injurious consequences arising out of acts not prohibited by international law" was marked by some significant changes in its basic approach. As recently as 1992, a working group had been established to reappraise the scope, approach and possible direction of future work on the topic; and yet, at the Commission's forty-eighth session, in 1996, another working group had been established to review the topic in all its aspects, and its report provided the substantive material for the Committee's current consideration of the topic.

6. In his delegation's view, the issue was one of reconciling the right of a State to engage in lawful activities and the right of a State to enjoy its facilities without disruption resulting from the activities of another State. To reconcile those rights required the application of the principle sic utere tuo ut alienum non laedas, which inevitably led to measures to prevent harm and to liability where harm occurred. The liability must be fundamentally a no-fault liability, to ensure that the innocent victim was not left to bear the loss alone, as indicated in the introductory note to the Working Group's report (A/51/10, annex I). His delegation was pleased to note that the draft articles were limited in scope and residual in character, and that to the extent that existing or future rules of international law prohibited certain conduct or consequences, those rules would operate within the field of State responsibility and would by definition fall outside the scope of the draft articles (introductory note, para. (2)). His delegation strenuously urged the Commission to proceed with its work towards the codification and progressive development of what was a separate field of international law. The distinction so clearly identified by the Working Group would not be blurred at all by the adoption of articles comprising residual rules which imposed obligations on States without affecting the lawfulness of the activities they were concerned with.

7. In general, his delegation was satisfied with the approach reflected in the draft articles and regarded them as an adequate basis for further work. Nevertheless, a few preliminary observations were in order. Draft article 1, with paragraph (b) included, and taken together with draft article 5, gave effect to the principle sic utere tuo ut alienum non laedas. His delegation was pleased that the draft article did not list activities, for the reasons given in the commentary thereto. Article 3 was a fundamental provision which recognized the limitations on a State's freedom of action, and its precise formulation must be approached with extreme care. Article 4, which was a statement of principle, must also be carefully formulated. He noted that paragraph (1) of the commentary to article 4 spoke of preventing or minimizing harm, whereas the article provided primarily for preventing or minimizing risk; also, the term "due diligence" appeared in paragraph (4) of the commentary to article 4, but did not appear in the articles.

8. The approach taken to the issue of compensation or other relief in chapter III of the draft was in the right direction, but it was important to avoid terminological confusion. His delegation was prepared to accept the exclusion of "absolute liability" or even "strict liability", as indicated in

paragraph (1) of the general commentary to the chapter, provided that it was accepted that no-fault liability was not also excluded. There would, after all, be no basis for compensation if there were no provisions for no-fault liability.

9. His delegation shared the view expressed in the last sentence of paragraph (1) of the general commentary to the draft articles, referring to the modern circumstances in all their aspects that made the topic relevant and urgent. It also endorsed the Commission's view that the Working Group's report represented a substantial advance. Ireland therefore urged the Commission to address the topic with the expedition it deserved.

10. Mr. Escovar-Salom (Venezuela) took the Chair.

11. Mr. MAHIOU (Chairman of the International Law Commission), introducing chapter VII of the Commission's report, said that it consisted largely of a systematic and comprehensive review of the Commission's procedures and methods of work, with suggestions for the Commission's future topics. The Planning Group's report to the Commission was set out in paragraphs 144 to 244 of the Commission's report. The Commission believed that there was a continuing need for an orderly process of codification and progressive development of international law. However, the distinction between the two processes was unworkable and should be eliminated from the Statute of the Commission.

12. He now wished to draw attention to some of the recommendations intended to improve the effectiveness of the Commission. The General Assembly or other bodies of the United Nations system should be encouraged to provide the Commission with possible topics, so that the gaps in international law could be more easily identified. As the Commission relied heavily on the cooperation of the Sixth Committee and Governments, Governments should participate more actively in reviewing the Commission's work, and they should respond to requests from the Commission when replying to questionnaires and providing information.

13. The special rapporteurs' methods of work needed to be standardized and simplified, to avoid delays and misunderstandings. Special rapporteurs should be asked, for example, to specify the nature and scope of work planned for the next session, their reports should be available sufficiently in advance of the session at which they were to be considered, and they should collaborate with a consultative group of members of the Commission to test ideas. They should also, as far as possible, produce commentaries to accompany their draft articles in advance and review them in the light of changes made by the Drafting Committee.

14. The Commission's plenary debates should address the substantive issues and general policy, and greater use should be made of working groups. Moreover, the Commission should consider a more flexible timetable for its sessions; it had decided to hold a 10-week session, instead of a 12-week one, in 1997, and intended to experiment with a split session in 1998.

15. As many areas of international law required the attention of specialists with the necessary technical background, the Commission should cooperate more closely with other specialized law-making bodies, both within the United Nations system and on a regional level. Furthermore, the Statute of the Commission

required some modification to reflect the evolution of its structures and methods of work; the Commission's fiftieth anniversary, in 1999, would be an appropriate occasion to make the necessary changes.

16. With regard to the Commission's long-term programme of work, annex II of the Commission's report classified topics under 13 main areas of public international law. The three topics identified by the Commission as appropriate for codification and progressive development were: diplomatic protection; ownership and protection of wrecks beyond the limits of national maritime jurisdiction; and unilateral acts of States.

17. Cooperation with bodies such as the Asian-African Legal Consultative Committee, the European Committee on Legal Cooperation and the Inter-American Juridical Committee had continued to prove useful and beneficial for the work of the Commission.

18. The thirty-second session of the International Law Seminar had been held in conjunction with the Commission's forty-eighth session, in Geneva, and had been funded by voluntary contributions. The Commission noted with particular appreciation that the Governments of Cyprus, Denmark, Finland, Hungary, Iceland, Japan, Norway and Switzerland had made financial contributions. The sessions of the Seminar allowed young lawyers, many from developing countries, to familiarize themselves with the work of the Commission and the activities of international organizations based in Geneva. As funds for the sessions were exhausted, the Commission recommended that the General Assembly should again appeal to States to make voluntary contributions to ensure that the seminar could be held in 1997 with as broad a participation as possible.

19. Mr. LÉGAL (France) said, with regard to the programme, procedures and working methods of the Commission, that its recommendation to revert to a shorter session (para. 149 (m) of its report) was a good one and that it might even be possible to cut it down to eight weeks. The workload should determine the duration of each individual session, and flexibility was the key. France was totally opposed to holding the Commission's sessions anywhere but in Geneva: the proposed split session between New York and Geneva (para. 149 (n)) would be counterproductive, costly and pointless.

20. The Sixth Committee was itself directly responsible for the improvement of the Commission's working methods. It had to respond to the suggestions, requests and concerns expressed to it by the Commission, by giving specific, realistic indications to the Commission of what Governments considered to be the priorities. General statements by the Committee on the Commission's report, culminating in a tangential resolution on the matter, were a poor way of proceeding, and the Committee bore at least equal responsibility for the inadequacy of the Commission's current methods and procedures. The free-ranging discussions during the meeting of the legal advisers to member States could be a model for the Committee's approach, and it should in future adopt a less neutral annual resolution clearly indicating the views of delegations on the various topics dealt with by the Commission.

21. As to the long-term programme of work (annex II), new topics had to be found for the Commission's consideration. France had at the previous session

endorsed diplomatic protection and the environment as topics, even though it believed the Commission was poorly equipped to embark on general codification of environmental law without a prior feasibility study. Other new topics that France would support were the ownership and protection of wrecks beyond the limits of national maritime jurisdiction, unilateral acts of States, and shared natural resources.

22. Mr. BOS (Netherlands) said that the Commission's success in the initial phase of its work had been due to the need for codification of international customary law as a result particularly of the decolonization process, but that the situation had changed. Although the normative content of a legal instrument and the extent to which it was enforced in practice were what mattered, the Commission - judging from the number of its draft conventions that had not entered into force or been widely ratified - had been less successful in the development of international law than in its codification. It was perhaps not the most suitable forum for tackling such matters, where major political interests were at stake.

23. Indeed, the Commission had applied itself first and foremost to the study of general doctrines and fundamental problems of international law, and that should be the criterion in selecting possible topics for referral to it. One of the points to be considered was whether a topic was likely to be successfully completed and whether the outcome would enjoy sufficiently wide political support. The Sixth Committee, taking into account the inevitable political urgencies, should in future clearly establish a priority among the topics on the Commission's agenda. The Netherlands endorsed as possible future topics unilateral acts of States and diplomatic protection.

24. It was for the Sixth Committee to make the final decision on the form to be taken by the drafts produced by the Commission. A convention was not always preferable to alternative types of legal texts, such as restatements or model conventions, and the same degree of thoroughness was involved in formulating them, or even guidelines or a body of principles, both of which were very important in current international legal practice.

25. The progress made on each topic depended partly on the amount of time that a rapporteur was able to spend on preparing it, and changes of rapporteur in midstream were counterproductive. Each prospective rapporteur should be asked to state clearly the feasibility of completing the task in a specified period of time and to plan his work realistically, generally within the period of the usual five-year term. Before embarking on any new topic, indeed, the Commission should conduct a feasibility study, in order to avoid the problem of having unprofitable subjects remain endlessly on its agenda. The Commission's established procedure of first and second readings was a sound working method, if properly planned.

26. The problem of the Commission's slow progress in its work and the multiplicity of subjects on its agenda were both in part attributable to the Sixth Committee. It was putting the cart before the horse to have the Commission itself propose topics for the approval of the Committee, as had become standard practice. According to Article 13 of the Charter, the General Assembly should steer the process, which meant that the Sixth Committee must

ensure that the Commission had a workable agenda. The Committee must monitor the Commission's workload and consider the urgency of the various topics, and provide clearer indications of the political need for a solution to a particular problem and the time within which that could be expected to be achieved. The Committee's leadership in that respect would depend on the quality of its members; and the innovation of having the legal advisers to Member States attend the Committee's discussions of the Commission's report added needed expertise. The main improvements would thus have to be better planning, a sharper definition of the topics to be explored and greater professional expertise.

27. Mr. AL-BAHARNA (Bahrain) said that Bahrain endorsed the recommendations in paragraph 149 of the Commission's report. Being logical and feasible, the recommendations would improve the Commission's programme of work and its relationship with the Committee, and promote the Committee's involvement in planning. It was very important, for instance, for the reports of special rapporteurs to be submitted in advance of the Commission's session (para. 149 (f) of the report); and consideration of any delayed reports should be deferred to the Commission's following session. Similarly, the Commission's own report, which should indeed be shorter and more structured (para. 149 (e) of the report), should be made available much sooner than the end of September, as was currently the case, for the Committee needed more time to study such a technical report. Of course, the Commission had to reconcile the scheduling of its session with the time required for preparing its own report, a problem that might be alleviated by the proposed shortening of the Commission's session (para. 149 (m) of the report).

28. Bahrain agreed that the current system of assigning different members of the Drafting Committee to deal with different topics should be maintained (para. 149 (j)) and further proposed, for the sake of speed, that the Drafting Committee might be split into two committees under two different chairmen, each discussing a different topic at the same time.

29. With regard to the long-term programme of work, there was no question that the Commission needed new topics to be assigned to it by the General Assembly and Bahrain endorsed the three topics identified by the Commission in paragraph 249 of its report, namely, diplomatic protection, ownership and protection of wrecks beyond the limits of national maritime jurisdiction, and unilateral acts of States. In addition, there was room for other topics to be selected from among those the Commission listed in annex II. The Sixth Committee should consider the possibility of setting up an ad hoc working group to choose the most appropriate topics.

30. Mr. SUCHARIPA (Austria) said that, as his delegation had pointed out at the fiftieth session of the General Assembly, the traditional mechanisms of the codification and progressive development of international law were proving less effective than in the past: since 1980 not a single convention drafted by the International Law Commission had entered into force. The Commission thus risked losing its central place in international law-making in the United Nations system. Measures to give a new momentum to the creation of legal rules in a cooperative relationship between the Commission and the Sixth Committee were an important part of the reforms in the United Nations.

31. The deliberations on the Commission's report on the work of its forty-seventh session had shown that there was indeed room for improving the efficiency of international law-making both in the Commission and in the General Assembly. The Austrian delegation had stressed the need for examination of the Commission's working methods, with a view to producing speedier results likely to be accepted by the community of States. General Assembly resolution 50/45 had echoed several of Austria's concerns in that respect. His delegation now commended the Commission for the candour of its current report, in which most of the issues raised at the previous session had been addressed. It was in agreement with nearly all of the Commission's conclusions and recommendations (paras. 148 and 149 of the Commission's report) but wished to add a few comments.

32. As indicated in conclusion (a), the distinction between codification and progressive development had lost most of its relevance. The Commission's Statute should therefore be reviewed to take account of changes in the normative processes. The orderly process of codification of international law (conclusion (b)) was vital to the very concept of international law binding on the whole international community and must be continued. With regard to the identification of new topics (recommendations (a), (b) and (c)), there was merit in even closer cooperation between the Committee and the Commission, possibly through informal contacts as at the meetings of legal advisers. The Committee bore a heavy responsibility in that respect and it could also improve the structure of its discussion of the Commission's report, including resort to open-ended working groups on the various topics and the encouragement of formal statements which facilitated the understanding of the positions of States; the submission of position papers to accompany statements might be useful. As to recommendations (f), (g) and (h), his delegation had suggested that the special rapporteurs should be backed up by assistance from the academic community and non-governmental institutions. They might well be invited to attend the Committee to answer questions about their topics.

33. In the Commission's long-term programme the topic of diplomatic protection, outlined in addendum 1 of the report, deserved special attention. The Commission should consider in particular the situation of persons affected by State succession and the exercise of diplomatic protection by a State other than that of the national concerned.

34. Mr. CALERO RODRIGUES (Brazil) said that, although the Commission's Statute envisaged two different procedures, codification and progressive development were not in fact watertight concepts. The Commission had now noted in its report that it was difficult to draw a distinction between them and that it had always worked on the basis of a composite concept. In response to doubts expressed, the Commission had offered a useful demonstration of the need to continue the work of codification and progressive development. The main branches of international law had indeed been codified, but as the pace of international relations accelerated new needs for legal regulations appeared.

35. Annex II to the report presented an updated overview of the whole field of international law, showing that there were still many topics suitable for inclusion in the Commission's programme. The selection of topics must be made carefully, with both the Commission and the Committee playing a part. Only four

topics remained on the Commission's agenda, and the Committee was to decide at the present session on the inclusion of the suggested new topics of diplomatic protection and the law of the environment. The Commission was now suggesting two further topics: ownership and protection of wrecks beyond the limits of national maritime jurisdiction, and unilateral acts of States. No decision should be taken on them until the next session of the General Assembly, by which time Governments would have submitted their comments. The Brazilian delegation believed that the Commission should be authorized to take up the topic of diplomatic protection, but it was puzzled by the fact that the Commission had not repeated its request to be authorized to undertake a feasibility study on the rights and duties of States for the protection of the environment. It had repeated such a request in relation to diplomatic protection.

36. Turning to the Commission's procedures, he said that the work accomplished at the 12-week sessions indicated that it did not pass its time in idleness. It had decided to reduce its next session to 10 weeks "as an exceptional measure" and "having regard to current financial difficulties". The Brazilian delegation, however, thought that the length of any session should be decided on the basis of the workload, with no standard duration, subject to a maximum length of 12 weeks but no minimum. It could not take a position on the question of splitting the session into two shorter sessions. It was not certain that such a move would improve the Commission's efficiency, and there was insufficient information about the financial implications. It therefore endorsed the Commission's suggestion that a split session should be tried in 1998, by which time the new members joining in 1997 would have settled in.

37. The special rapporteurs were the lead players in the discussion of topics and preparation of commentaries. The Commission recognized the importance of their contribution and had suggested ways of clarifying the relationship between them and the Commission. However, while some special rapporteurs might find it useful to work with the proposed consultative groups, others might not; requiring special rapporteurs to provide commentaries to their draft articles might impose an unnecessary burden, especially as the need for further explanation was questionable; and, while it was not a bad idea to ask the special rapporteurs to indicate at each session their plans for the next reports, they normally could not know beforehand how their reports should be developed, so that all that the Commission could expect was to be informed of the general thrust of future reports. The Brazilian delegation was glad therefore that the innovations were not to be mandatory.

38. The Brazilian delegation endorsed the Commission's view that its Statute should be revised in several respects. While chapter I of the Statute, on the organization of the Commission, had passed the test of time, chapter II, dealing with its functions, had not been followed in practice. It had been conceived on the basis of a distinction between codification and progressive development, but the Commission had soon realized that it was impossible to have two different working methods. It was strange that a United Nations body, particularly a legal one, had had to deviate from its basic instrument in order to perform its functions.

39. It would also be useful to revise the provisions of chapter I concerning the election of members of the Commission. While the present system did not in

practice jeopardize continuity, the possibility existed that an entirely new membership could be elected every five years. The term of office should perhaps be set at six years, and elections held every three years for half of the membership. As the Commission had suggested, the revisions might be adopted in 1999 to coincide with its fiftieth anniversary. It should be requested to submit draft revisions of its Statute to the General Assembly in 1998.

40. Mr. HAYASHI (Japan), commenting on chapter VII of the Commission's report, said that his Government believed that the proposals on the working procedures of the special rapporteurs and the utilization of working groups deserved careful consideration, as they could enhance efficiency. It also believed that further efforts should be made to promote the codification and progressive development of international law, to which the Commission could make a genuine contribution if it improved its work methods and selection of topics. As responsibility for the recent shortcomings in that connection should be shared between the Commission and the Sixth Committee, he reiterated that their relationship should be reviewed. His Government also proposed that the Commission should conduct studies in areas such as treaty law and environmental law with a view to the refinement of international law. He commended the outline for future work on diplomatic protection and urged endorsement of the proposal concerning a feasibility study aimed at clarifying issues in the development of environmental law, as it was essential to maintain an integrated approach to the prevention of environmental destruction. His delegation believed that those two topics should receive priority and that consideration of the proposed topics "Ownership and protection of wrecks beyond the limits of national maritime jurisdiction" and "Unilateral acts of States" should be deferred.

41. Mr. AYEWAH (Nigeria), referring to chapter II of the report, said that his delegation was in favour of limiting the list of crimes included in the draft Code of Crimes against the Peace and Security of Mankind to those which would be difficult to challenge as falling under that category, the aim being to achieve consensus and facilitate international acceptance of the draft Code. However, as a more comprehensive draft Code would have greater effect, consideration should later be given to the inclusion of crimes such as institutionalized racial discrimination and the recruitment of mercenaries. While generally agreeable to the content of draft articles 16, 17, 18 and 20, his delegation believed that draft article 19 should be re-examined, as the threshold of the terms "systematic manner" and "large scale" was susceptible to subjective interpretation. The draft Code should take the form of a treaty and be linked with the draft statute for an international criminal court. He therefore strongly supported the decision to draw the draft Code to the attention of the Preparatory Committee on the Establishment of an International Criminal Court, which should endeavour to ensure the harmonization of the two drafts in question.

42. Turning his attention to chapter III of the report on State responsibility, he said that States would be reluctant to accept the problematic concept of State crimes, their main concern being that the criminalization of a State could result in the punishment of an entire people, with adverse consequences. Against that background, the distinction made in the draft articles between international crimes and international delicts was impractical, as were the

consequences referred to in draft articles 51 to 53. He viewed with interest the newly suggested mechanism that would entitle the injured State to demand reparation when it decided that a crime had been committed and the alleged wrongdoing State to challenge such decision and use the dispute settlement procedures stipulated in the draft Code. The previous proposal of a two-phased procedure involving the Security Council and the International Court of Justice nevertheless had some merit. His delegation believed that the existence of internationally wrongful acts should be determined by the Court or its ad hoc chamber. It also supported the inclusion of provisions on countermeasures, despite the controversy which they provoked, bearing in mind that draft article 47 provided safeguards against unjust results of countermeasures applied between States of unequal strength or means. It further supported the import of draft article 48, as well as the provision for compulsory dispute settlement, which was essential to the implementation of a future convention on State responsibility.

43. Concerning chapter IV of the report, on State succession and its impact on the nationality of natural and legal persons, he said that he supported the decision and suggested time-frame concerning the subject of nationality in relation to the succession of States and agreed that the results of the work should be transmitted to the General Assembly in the form of a declaration. He also expressed his preference for discussion to commence with the nationality of natural persons.

44. With respect to chapter V, on international liability for injurious consequences not prohibited by international law, he said that he welcomed the establishment of the Working Group, since it regarded codification of the subject as a worthwhile venture. He supported the retention of draft articles 1 (b) and 5, but believed that the extension of State responsibility to cover violation of preventive measures, provided for in draft article 22, imposed a heavy duty on States and would be difficult to enforce in certain instances. He nevertheless saw merit in extending the principle of good neighbourliness to cover situations arising from flagrant lack of care and concern for the safety and interest of other States and supported the flexible approach contained in draft articles 20 to 22 on compensation procedures for injured parties. Lastly, he said that he supported the conclusions and recommendations contained in paragraphs 148 and 149 of the report, particularly the recommendations set out in paragraphs 149 (e), (l), (m), (n) and (q).

45. Mr. LEHMANN (Denmark), speaking on behalf of the Nordic countries, said that the draft Code of Crimes against the Peace and Security of Mankind and the draft articles on State responsibility were closely linked and responded to the current demand to move from law to action. The useful indications contained in paragraphs 22 to 29 of the Commission's report represented a distinct improvement; moreover, in general the Nordic countries subscribed to the recommendations set out in paragraph 149. They believed, however, that the Commission should not use its precious time to review its own Statute, which could involve prolonged and potentially unfruitful discussions. A valuable recommendation concerned the use of working groups to assist the special rapporteurs and act in place of the Drafting Committee with a view to expediting work, although the practice of appointing special rapporteurs was nonetheless a

reasonable way of guiding work on less urgent topics which required the development of expertise over time.

46. As the main themes of public international law had generally been codified, the Commission might now assist other international agencies in the task of clarifying and articulating particular areas of law, where required. In that connection, the annual survey of ongoing legal activities prepared in the context of the United Nations Decade of International Law could serve as a useful point of reference for those agencies and for the identification of troublesome points or deadlocks which the Commission could help to resolve. Similarly, the two new topics already on the Commission's agenda and the three newly suggested topics for its future agenda all appeared to belong in the category of very specific projects supplementary to existing codifications, thus leaving scope for the Commission to accomplish other tasks, in which connection the establishment of working groups would appear to be particularly appropriate.

47. The Nordic countries looked forward to the achievement of substantial progress in the work on the topics of reservations to treaties and succession of States and its impact on the nationality of natural and legal persons. In connection with the latter topic, they endorsed the recommendation to give priority to the question of the nationality of natural persons, to which a sense of urgency was attached. The Commission's suggested working hypothesis concerning the final form of the exercise was also well taken in that it would represent a timely contribution to the progressive development of the legal principles concerning nationality. The Nordic countries saw merit in pursuing the newly suggested topic of diplomatic protection, but were more reserved in regard to those of unilateral acts of State and ownership and protection of wrecks beyond the limits of national maritime jurisdiction. In particular, they believed that it was premature to develop international regulations concerning the latter topic, given that the Convention on the Law of the Sea had not been long in force. Lastly, they envisaged that the slight change in the future work of the Commission would enable it to continue serving the international community in a timely and useful fashion.

48. Mr. HOLMES (Canada) said that his comments on the draft Code of Crimes against the Peace and Security of Mankind would be of a general nature as it still had to be considered by a Canadian interdepartmental group.

49. Some of the crimes included in the draft Code were already covered by existing instruments of international law or were considered to form part of customary law. In other instances, the international instruments might already provide for universal jurisdiction, include prosecute-or-extradite provisions, or allow for prosecution by an international criminal court. Extension of those important concepts of international law to all the crimes included in the draft Code would require careful consideration.

50. Some of the provisions appeared to go further than existing law and consideration should be given to whether and how they should be included in the draft Code: for example, institutionalized racial discrimination and severe and wilful damage to the environment. Moreover, the article setting out the extradite-or-prosecute obligation did not properly reflect the current discretion of States to consider whether there was sufficient evidence to

prosecute. Furthermore, the distinction between crimes against humanity and crimes against the peace and security of mankind needed to be clarified. His delegation was pleased to note, however, that crimes committed during non-international armed conflict were included in the article on war crimes.

51. Further work was required on the draft Code and his delegation was prepared to consider the different options, such as the negotiation of a convention or declaration on the matter, or incorporation of the draft Code into the statute of the proposed international criminal court, in view of their common roots in the international community's reaction to events of the Second World War.

52. The establishment of two international criminal tribunals for the former Yugoslavia and Rwanda had renewed enthusiasm for the establishment of a permanent international criminal court. His delegation believed that it was important to benefit from such revived interest and that it would unduly delay negotiations on the court if the draft Code were to be directly incorporated into its statute. The statute should, however, include a provision allowing for periodic review to permit changes reflecting improvements to its substantive or procedural content or developments in international law; at such time, it could also be amended to incorporate relevant provisions of the draft Code that were ultimately accepted by the international community.

53. His delegation believed that the draft articles on international liability for injurious consequences arising out of acts not prohibited in international law provided a good basis for further work by the Drafting Committee. Nonetheless, in some instances, points mentioned only in the commentary should be brought into the text of the articles while, in others, additional articles were required. His delegation would be presenting detailed suggestions in writing. It considered, for example, that there should be a separate article on monitoring and article 9 should explicitly state that States must not authorize activities involving a risk of transboundary damage unless measures were taken to prevent such damage from occurring.

54. More serious was a fundamental flaw that had impeded progress on the topic since its inception: the question of its theoretical basis and its relationship to State responsibility. His delegation believed that the fact that certain activities were not prohibited by international law was irrelevant to the question of liability and compensation. Most activities that caused harm were not illegal. In order to eliminate some of the conceptual confusion, his delegation proposed that the title of the topic should be changed to something like "The prevention of and compensation for transboundary harm".

55. His delegation was surprised to read in the commentary to draft article 22 that the Commission considered that the obligations to prevent transboundary harm were not "hard" obligations and that their breach did not entail State responsibility. Canada agreed with the inclusion of the issue of prevention in the draft articles. The articles on prevention were important in distinguishing the liability topic from the articles on State responsibility. However, the obligation of prevention was a primary rule and once that rule was breached, the realm of secondary rules was entered, which meant State responsibility. The obligation of prevention was not an innovation, but a general principle of law deeply rooted in the international system. Thus, his delegation considered that

the obligation to prevent transboundary harm was a long-standing "hard" obligation of positive international law, and a breach of such an obligation would entail State responsibility. The subsequent obligation of mitigation and elimination of significant transboundary harm should also be developed more thoroughly in the draft articles.

56. Another important issue was whether compensation was due even if the State of origin had diligently attempted to prevent transboundary harm. Draft article 22 (b) seemed to suggest that an important factor in compensation negotiations was the extent to which due diligence was exercised; that implied that there was an obligation of due diligence to prevent harm, and not an absolute obligation to prevent it. A due diligence standard was certainly not appropriate for all activities that might cause significant transboundary harm, as there were certain ultra-hazardous activities that might demand a strict liability standard. The use of the phrase "due diligence" would seem to entrench unnecessarily a standard of liability that was subject to development in the international legal regime - for example, as environmental crises became more acute - leading to a stricter approach to liability, and could be replaced by "all appropriate measures".

57. His delegation did not believe that undertaking a feasibility study on the topic of international environmental law would be a productive use of the Commission's time and resources as work on the topic would simply duplicate other work already being done within the United Nations system.

58. The Commission's recommendations regarding the working methods were well-considered and useful. Timely reports were essential for the fruitful exchange of information and ideas on international law. The proposals regarding future sessions should lead to additional savings in operating costs and allow for the greater use of time and resources.

59. Mr. HILGER (Germany), referring to the recommendations set out in chapter VII of the Commission's report, said that there was a perceived need for a more comprehensive review of the codification process within the United Nations system. His delegation agreed that the distinction drawn in the Commission's Statute between progressive development of international law and codification was difficult to apply in practice. However, in future, the Commission should base its work on any given topic on international conventions and custom, and the recognized principles of law, and then proceed to consider what contributions to progressive development might be acceptable to the international community, in close consultation with the latter. Consultation was equally essential for the selection of new topics. The General Assembly and other bodies in the United Nations system should be encouraged to submit proposals to the Commission.

60. The issue of codification had not been completely exhausted. Today, there was rarely need for codification on a grand scale. However, United Nations codification to date had provided the international community with many important conventions and current work on the establishment of an international criminal court and on the draft Code of Crimes against the Peace and Security of Mankind clearly indicated its importance.

61. Clarification, development and articulation were also important tasks for the Commission which needed to be undertaken in close consultation with Governments; it was difficult for Governments to remain interested and to have a clear idea of where the Commission stood at a particular time when work on certain issues had been going on for many years. In that regard, he noted that the Commission's report provided such information on certain long-standing issues.

62. He acknowledged that the Commission had been able to respond promptly when given mandates with a sense of political urgency, although there was still room for improvement in interaction between the Commission and Governments.

63. He welcomed the proposal that at its following session the Commission should consider ways and means to make its report more "user-friendly", and suggested that new computer technology could be used to improve presentation. States could be encouraged to make their views known if questionnaires were more concise and confined to the essential.

64. His delegation believed that special rapporteurs still played a justifiable role. One person should continue to be responsible for a given topic, retaining responsibility for reports, but working in conjunction with a consultative group.

65. In plenary meetings, the debate should be structured and limited to the point under discussion. While every effort should be made to reach consensus, the proposal of indicative votes merited consideration. The Drafting Committee generally worked well and the working groups were a very useful means of bringing collective wisdom into play, sharing the burden of the special rapporteur and accelerating work.

66. With regard to single or split sessions, the Secretariat should advise the Commission and the Sixth Committee as to whether a split session was practicable; his delegation agreed to the proposal to try a split session in 1998.

67. The German Government agreed with the basic principles of State succession and its impact on the nationality of natural and legal persons, outlined in the Commission's report (para. 86). It was essential that every individual should have a right to the nationality of at least one of the successor States. Furthermore, the question of the nationality of natural persons should be given priority. The complex question of the nationality of legal persons should not delay work. The proposed form of a General Assembly declaration consisting of articles with commentaries appeared appropriate.

68. His delegation would not take a definite stand on the work on international liability for injurious consequences arising out of acts not prohibited by international law, as the report merited further consideration by the German Government. However, he proposed that written comments should be requested, to be submitted before the Commission's following session, so that it would know whether the international community agreed to continue with the work as suggested.

69. With regard to the newly proposed items, his delegation believed that diplomatic protection would be a useful amendment to the rules of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. In view of the increase in cases of multiple nationality and the growing complexity of international trade and economic relations, it appeared reasonable to start work on draft rules to define the rights and obligations of the State that had personal jurisdiction and the State that had territorial jurisdiction. Work on the topic of the ownership and protection of wrecks beyond the limits of national maritime jurisdiction would be useful, especially in view of potential environmental dangers, but the relevant work of other bodies should be taken into account. As to unilateral acts of States, his delegation was less certain as to the practical implications of such work, although it might be useful to have some indications as to when a State was considered bound and for what period of time.

AGENDA ITEM 151: MEASURES TO ELIMINATE INTERNATIONAL TERRORISM (continued) (A/51/336; A/C.6/51/6 and A/C.6/51/9)

70. Mr. JESSEN-PETERSEN (Director of the Liaison Office of the United Nations High Commissioner for Refugees) said that the High Commissioner shared Governments' concerns about international terrorism and agreed that individuals resorting to terrorist acts should not be protected as refugees. The Committee's draft declaration on the implementation of the 1994 Declaration on Measures to Eliminate International Terrorism had received much attention from the Office of the United Nations High Commissioner for Refugees (UNHCR), since it created a link between the Declaration and the 1951 Convention relating to the Status of Refugees. UNHCR wished to clarify its views on the Convention as it related to the present initiative.

71. There should not be any unwarranted linkage between refugees and terrorists and the Convention should not be portrayed as standing in the way of the prosecution of terrorists. It did not provide protection for terrorists or any immunity from prosecution. It did provide for expulsion and return, actions which might be taken by States when there was a threat to national security or public order or with respect to refugees convicted of a particularly serious crime. Terrorists acts committed by refugees or asylum-seekers should generally be prosecuted under the laws of the host country. Refugees were also bound to conform to the laws of the host country and might be prosecuted to the full extent thereof. The Convention's exclusion clauses were intended to be applied restrictively. In particular, the provision on acts contrary to the purposes and principles of the United Nations was rarely used, primarily because the issues were broad ones of international peace and security which overlapped with the exclusion categories of crime against peace, war crimes and crimes against humanity. Proper application of the existing provisions would make it unnecessary to expand the scope of article 1, section F (c). Indeed, proper application of the Convention, coupled with enforcement at the national level, would both exclude asylum-seekers involved in terrorist acts from refugee status and prevent the protection of persons committing or conspiring in the commission of terrorist acts.

72. UNHCR certainly wished to contribute to a comprehensive legal framework covering all aspects of international terrorism. The best way to deal with the issue as it affected refugees was to call for more vigorous application of the existing instruments and not to introduce ambiguity in the application of the 1951 Convention.

The meeting rose at 6.30 p.m.

UNITED NATIONS

General Assembly

FIFTY-FIRST SESSION

Official Records

SIXTH COMMITTEE
41st meeting
held on
Friday, 15 November 1996
at 10.00 a.m.
New York

SUMMARY RECORD OF THE 41st MEETING

Chairman: Mr. ESCOVAR SALOM (Venezuela)

CONTENTS

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued)

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The meeting was called to order at 10.05 a.m.

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued) (A/51/10 and Corr.1, A/51/332 and Corr.1, A/51/358 and Add.1 and A/51/365)

1. Mr. CANDIOTI (Argentina) said that, as was pointed out in the conclusions of the report of the International Law Commission, to decide what methods would enhance the progressive development and codification of international law required one to take a view of the present scope for progressive development and codification, after nearly 50 years of work by the Commission. In that regard, despite the changes that had occurred in international law and organization since the Commission's creation, there was important continuing value in an orderly process of codification and progressive development. Moreover, the Commission could and should continue to play an important role in the creation of a more just world order. The Commission had been created shortly after the Second World War on the understanding that the promotion of international law was a basic precondition for international peace and security and for cooperation among nations. The Commission had responded to that challenge by offering States a number of several solid foundations for the promotion of juridical security through successful codification projects. The Commission had rightly understood that its mandate was not limited to the mere compilation of existing law and had therefore undertaken an ongoing process of innovation, renewal and modernization of prevailing norms within the framework of the progressive development of international law. As the Commission noted, the distinction between codification and progressive development was difficult if not impossible to draw in practice, as the two concepts had become virtually indissociable. However, it did not seem appropriate to eliminate that distinction from its Statute, as the Commission proposed. The two concepts, which were enshrined in the Charter, continued to evoke a fundamental difference between simply reviewing existing norms and taking the modernizing approach of choosing among the various alternatives for future norms.

2. In the light of the experience gained in the codification field over the past 50 years, it should be recognized that, in order to be effective, the codification process must meet the following requirements: drafts must not be the product of drafting work done by the Commission's members in isolation, but must be backed up by States' permanent commitment to the Commission's work; the choice of topics to be considered by the Commission must be realistic and respond to the priority needs of the international community; and topics must concern areas on which there was a minimum consensus in favour of codification, and which were not controversial. The acceptability of a draft convention depended on the proposition of customary norms included in it, which did not mean ruling out their progressive development, however. In that connection, States must see draft codes not as something divorced from their day-to-day reality but as useful and necessary tools for enhancing that reality and improving their population's living conditions. Otherwise, the Commission's drafts would lack the government support necessary for their adoption at the national level. For that reason, it was important that channels of communication be established with Governments, since dialogue, coordination and consultation were the road to cooperation and to the establishment of legal norms that reflected common values shared by all members of the international

community. He welcomed the Commission's recommendations for enhancing its relationship with the Sixth Committee, which might require shortening the time allocated to consideration of the Commission's report and to the general debate in order to permit an informal exchange of views on the principal problems and questions posed by the Commission's work. Lastly, he supported the Austrian delegation's suggestion that the interaction between Governments and the Commission should be strengthened.

3. Mr. NGUYEN DUY CHIEN (Viet Nam) expressed appreciation to the Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law for having submitted to the Sixth Committee a set of draft articles dealing with different aspects of the issue. The draft articles provided the necessary framework for the completion of work on that complex topic. He drew particular attention to draft article 4, which emphasized the necessity of preventive action, and draft article 17, dealing with consultations on preventive measures.

4. Concerning the topic of reservations to treaties, it was necessary to bear in mind that the principle of consensus was the backbone of the treaty-making process. It meant that States were entitled to formulate reservations to multilateral treaties to which they intended to become parties, subject to the conditions laid down in the corresponding treaty. If there were no such provisions in the treaty in question, reservations should be made in accordance with the 1969 Vienna Convention on the Law of Treaties. The practice of allowing reservations had opened the door to wider acceptance of multilateral treaties by States. It was necessary therefore to preserve the achievements of the 1969, 1978 and 1986 Vienna Conventions. Moreover, as many delegations had pointed out, there were no convincing reasons to justify a separate reservations regime for some types of treaties. There should be one reservations regime for all treaties and the permissibility of reservations to a treaty should be decided by the States parties to that treaty.

5. With regard to the Commission's future work, he expressed support for splitting the Commission's annual session into two parts, one to be held in New York and the other in Geneva.

6. Mr. SIDI ABED (Algeria), referring to the draft Code of Crimes against the Peace and Security of Mankind, said that there was no justification for the Commission's having chosen, in keeping with the minimalist approach, to include only five crimes. Important offenses had been omitted. The idea of restricting the content ratione materiae of the draft Code, at least provisionally, along the lines indicated in paragraph 41 of the Commission's 1995 report had been abandoned for dubious juridical and political reasons. For instance, the exclusion of the crime of terrorism could only have been due to political considerations. Furthermore, it did not seem appropriate to include crimes against United Nations and associated personnel in the category of crimes against the peace and security of mankind when other crimes whose seriousness and international character were not in doubt, such as terrorism, had been excluded. The draft Code should also include as crimes certain acts of terrorism which constituted a threat to the peace and security of mankind, thereby providing a useful benchmark for the work of the Preparatory Committee on the Establishment of an International Criminal Court.

7. With regard to the topic of State responsibility, the concept of crime by a State raised questions. To distinguish between crimes and delicts within the scope of the international responsibility of States was warranted, since the two types of offenses differed in nature. Both involved unlawful conduct on the part of a State, although their nature and gravity varied greatly. For that reason, wrongful acts should be ranked in a hierarchy. There were particularly serious offenses which could surely be regarded as crimes, such as aggression, slavery, apartheid and any act constituting a serious and systematic threat to the fundamental rights of the human being. Such crimes evoked the concept of jus cogens, i.e., peremptory norms of general international law, despite the legal uncertainties to which a precise definition of such crimes might give rise.

8. As to practical means of imputing responsibility to States for wrongful acts, that was a difficult and complex issue because of its political implications. In that context, he was opposed to conferring on the Security Council any powers beyond those strictly provided for in the Charter of the United Nations.

9. With regard to countermeasures, the aims should be threefold: to avoid an escalation of measures and countermeasures, to avoid aggravating the existing inequalities between States to the benefit of stronger States, and to establish conditions relating to resort to countermeasures in the event that they could not be prohibited.

10. Concerning the topic of international liability for injurious consequences arising out of acts not prohibited by international law, a convergence of views appeared to be emerging on how to approach the topic. The aim was to formulate clear definitions of preventive measures and to develop rules governing compensation for damage based on the "polluter pays" principle.

11. With regard to the future work of the Commission, its workload should not be increased arbitrarily to the detriment of the topics already under consideration. The long-term programme of work should include topics which could be the subject of consensus and which genuinely met the current and future needs of the international community. The Commission had an obligation to respond to the needs of the international community and to develop legal norms that would not be superseded with the passage of time. The long cold war era, which had been so unfortunate for mankind in many ways, had paradoxically given rise to a proliferation of international legal instruments designed not so much to spur the dynamic growth of the international community as to establish specific rules for regulating manifestations of the relationship of forces. The current transitional period should once again enable international law to fulfil its noble function of regulating peaceful coexistence and cooperation among States.

12. Mr. BIGGAR (Ireland), referring to chapter VII of the Commission's report entitled "Other decisions and conclusions of the Commission", concurred with the following statement in paragraph 148: "To decide what methods will enhance the progressive development and codification of international law requires one to take a view of the present scope for progressive development and codification, after nearly 50 years of work by the Commission." He also agreed that the

distinction between codification and progressive development was difficult to draw.

13. Turning to paragraph 149 of the report, he was not entirely convinced by the argument that the Commission's report should be shorter and more thematic. In particular, he was concerned at the suggestion that the information and analysis provided should be reduced considerably in the interest of greater concision; he failed to see how that would contribute to a better structuring of the debate on the report in the Sixth Committee. There might well be occasions on which the task of a special rapporteur would be facilitated by the assistance of a consultative group composed of members of the Commission. Nevertheless, the creation of such groups should not hinder the freedom of the special rapporteurs as to both the content and the presentation of their recommendations. It was important for institutions to take stock of their activities from time to time and to be receptive to constructive criticism. In that context, it would seem appropriate to consider the consolidation and updating of the Commission's Statute on the occasion of its fiftieth anniversary in 1999.

14. Annex II of the report mentioned three possible future topics, namely, diplomatic protection, ownership and protection of wrecks beyond the limits of national maritime jurisdiction and unilateral acts of States. Those topics could be included in the long-term programme of work of the Commission so long as they did not exclude other alternatives. Consideration should also be given to the inclusion of other topics, such as the rules of law pertaining to the protection of the environment and the peaceful uses of outer space.

15. Paragraph 176 of the report stated that there had never been a woman member of the Commission. He recalled that the Charter of the United Nations reaffirmed faith in the equal rights of men and women and that such equality was also embodied in the Universal Declaration of Human Rights, the International Covenants on Human Rights and many other international human rights instruments. He therefore urged governments to rectify that situation by nominating candidates. For its part, the Commission should avoid the unintentional use of terms conveying a gender bias.

16. Mr. BAKER (Israel) shared the view expressed by the Commission as to the difficulty of distinguishing between codification and progressive development of international law, especially in an era in which the development of international law took place in specialized spheres through the activities of various institutions, the regionalization of the handling of specific issues and an increase in law-making bodies, whether private or official, formal or informal. In one way or another, all those elements influenced the formulation and systematization of existing rules of international law and the topics requiring development and regulation. For instance, while the law of treaties had been codified in various conventions, such as the Vienna Convention of 1969, the Commission sought to clarify questions regarding reservations that had arisen since then. It was unclear whether that process involved recodification or progressive development (post codification), but what was clear was that the job needed to be done.

17. In one vital sphere, Israel's problems vis-à-vis the Commission's procedures and working methods differed from those of other States. According

to its statute, the members of the Commission were elected, not on the basis of political representation, but so as to represent the main forms of civilization and principal legal systems of the world, in addition to which its members must of course individually possess the requisite qualifications of competence in international law. However, neither of those factors permitted Israel, which was not a member of a regional group, to nominate a candidate for election. He therefore felt that the functioning of the Commission had some deficiency in that its composition could not be determined in the manner set forth in article 3 of its statute. Ever since the election process had been geared to the regional grouping system, as prescribed in amended article 9 of its Statute, States that were not members of a regional group had been denied the right to nominate a candidate. Thus, Israel could not accept the statement made in paragraph 175 of the Commission's report (A/51/10) according to which the existence of regional groups for the purposes of election "assists in assuring the representativeness of the Commission as a whole". That statement could not be considered accurate until "representativeness" by every State was recognized and rendered possible by the Commission's statute.

18. His delegation agreed with the recommendation that special rapporteurs should be asked to work with a consultative group of members of the Commission (para. 149 (g)), a proposal that would make it possible to maintain the general direction of the specific topic as intended in the initial proposal or request to the Commission.

19. As to the interrelationship between the Commission and the Sixth Committee, it was a vital component of the functioning of the Commission which must be improved and rendered more effective. The Commission clearly needed the input of the Sixth Committee, and that input should be as constructive as possible, whether through responses to questionnaires, through written comments by Governments or through oral comments on the Commission's annual report. However, that oral process must be more structured. Rather than continuing the current practice of making general statements, which in any event were then forwarded in writing to the Commission, it would be preferable to take advantage of the presence of the Chairman and of the Special Rapporteurs of the Commission in order to engage in a more structured, dynamic and direct dialogue and discussion with them.

20. As to the long-term programme of work, Israel considered that the study on diplomatic protection was the most important topic and one that the Commission might take up.

21. Ms. WILLSON (United States of America) said that international circumstances and the needs and problems of international law were currently very different from those that had existed when the Commission had begun its work, for the basic legal structures for inter-State relations now existed. Many institutions and tribunals applied the norms of international law and generated new ones, and the system of international law reached into new fields, creating a risk of fragmentation of the law and posing basic questions.

22. The work of the Commission would be of little use if States were not influenced by it. Thus, the Commission and the Sixth Committee must carefully consider the former's workings and work programme. Many of the suggestions included in the Commission's report made good sense. For the most part they

involved changes that the Commission could implement on its own authority and regarding which it was perhaps not appropriate for Governments to comment in detail. The United States considered the suggestions regarding the roles of the Special Rapporteurs, the Drafting Committee and the working groups, and on the utility of occasional indicative votes, to be sound. It also commended the decision to tailor the length of the 1997 session to the volume of work to be done, and awaited with interest the outcome of the proposed experiment to divide the 1998 session into two parts.

23. As to the Commission's future work, Governments must give better guidance in that regard. The United States would give that matter greater attention and would seek the advice of the experts on the Secretary of State's Advisory Committee on Public International Law. Two of the three topics proposed in paragraph 249 of the Commission's report - diplomatic protection and unilateral acts of States - should be of interest. With respect to diplomatic protection, the United States had already submitted detailed written comments, in which it had suggested that the Commission should begin its work with a study prepared by a special rapporteur for consideration by the Commission and by Governments; decisions regarding any further work could then be made in the light of the conclusions of that study. Her delegation saw no need to draft a convention in that area at the current stage.

24. As to the topic of the international legal consequences of unilateral acts, it was of practical importance, in view of the legal uncertainty prevailing, and accordingly a well-defined study describing the current state of the law would be of value. There again, the final objective should not be a convention.

25. Lastly, with respect to work on ownership and protection of wrecks beyond the limits of national maritime jurisdiction, the topic seemed somewhat obscure and narrow, and it was also being studied in other bodies, including the International Maritime Organization (IMO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO); she therefore urged the Commission to reconsider its suggestion on that topic in the light of the work under way in other forums.

26. Mr. BENÍTEZ SAENZ (Uruguay), referring to chapter III of the report of the Commission, on State responsibility, said that the distinction drawn in article 19 between crimes and delicts was one whose conceptual basis had been debated at great length in the Commission and one that was recognized by the International Court of Justice, which distinguished between the obligations of States vis-à-vis the international community as a whole and their obligations solely vis-à-vis other States. That was a sound distinction, but one that could be still further clarified in the text under consideration. As for the limitative enumeration of crimes, after the advisory opinion of the International Court of Justice, provision should be made for inclusion of the use of nuclear devices affecting the environment. With regard to the countermeasures proposed, the mechanism had been considerably improved, but it did not seem a positive move to limit them to so-called reciprocal countermeasures, since they were detrimental to the right of the injured State. As for the settlement of disputes, the graduated solutions contained in articles 54, 55 and 56 were to be welcomed, but the task of the Conciliation Commission, set forth in annex I, would perhaps prove a futile attempt to find a solution to the conflict of interests that had arisen. A dispute settlement

procedure that culminated in the International Court of Justice could be reliable and practical, reaffirming the role of the existing jurisdictional bodies and avoiding a proliferation of new bodies that was sometimes the subject of criticism.

27. As for chapter IV (State succession and its impact on the nationality of natural and legal persons), the working method proposed by the Commission was sound, requiring separate consideration of the questions of natural and of legal persons, which reflected an ethical and legal distinction that must be maintained in order to make for more thorough analysis of the topic.

28. Concerning chapter V (International liability for injurious consequences arising out of acts not prohibited by international law), he supported the principle embodied in draft article 1, subparagraph (b), namely, that the draft articles should apply to activities not prohibited by international law which, de facto, caused significant transboundary harm, even when they did not involve a risk at the time that they were carried out. Technological advances and people's constant urge to leave the realm of the known for the unknown made it advisable for some limit to exist and for the party which had caused the harm to incur objective liability. It did not seem appropriate to establish a regime of preventive intervention between States but a broad and effective regime of a posteriori liability should exist. The inclusion of a list of activities or substances in draft article 1 might limit the scope of the concept of liability to some extent.

29. Concerning the long-term programme of work of the International Law Commission (chap. VII, sect. A (2.)), the three topics mentioned in paragraph 249 of the Commission's report - diplomatic protection; ownership of wrecks; and unilateral acts of States - should be topics of study, although he did not agree with the views outlined in note 9 of addendum 2 of the annexes, since the jurisdiction of the coastal State beyond its territorial sea and contiguous zone was guaranteed by the residual competence granted to it under the 1982 United Nations Convention on the Law of the Sea.

30. Mr. DE SARAM (Sri Lanka) said that the work of the Sixth Committee, the Commission and the Office of Legal Affairs of the United Nations Secretariat must be adapted to the framework established in Article 2, paragraph 7, of the Charter of the United Nations. The objective must be for all States, regardless of their legal infrastructure, to participate in the elaboration of norms. There was no point in concluding a convention rapidly, only for States to formulate reservations afterward. Therefore, ways and means of improving the methods of work of the Commission and the Sixth Committee and the contribution of the Office of Legal Affairs should be reviewed annually.

31. Moreover, the primary role of the Commission was to advise the Sixth Committee on what the existing law was, when that law was clear and when it began to move into realms of uncertainty. On more than one occasion, the Commission had not informed the Sixth Committee of its interpretation of the law, which had caused a tremendous waste of time. For example, he mentioned the topic of State responsibility, on which there were differing views; if the Commission could not proceed because of differing views, it should so advise the Sixth Committee. It might be best to leave the solution of such questions to the international judicial authorities or arbitral tribunals.

32. Lastly, while it was important to seek a consensus, and the Commission had achieved one on extremely thorny issues, when that search became prolonged, it would be better for the Sixth Committee and for Governments if the Commission proposed possible alternative formulations.

33. In general, it was to be hoped that there could be a swifter and more dynamic relationship among the four factors whose activities could help to bring about progress in the consideration of international legal issues: the Commission, the Sixth Committee, Governments and the Office of Legal Affairs of the Secretariat.

34. Ms. GAO Yanping (China) welcomed the Commission's speedy response to the request made by the General Assembly in paragraph 9 of its resolution 50/45 of 11 December 1995. Chapter VII of the Commission's report contained concrete and substantive views which covered all relevant items for the Commission's long-term programme of work and valuable suggestions for the improvement of its work.

35. Concerning the codification and progressive development of international law, the Commission suggested that in a future revision of its Statute the procedures of codification and progressive development should be merged. She recognized that, at times, it might be impossible to separate the two aspects completely; nonetheless, in drafting instruments purely for purposes of codification, a clear distinction should be drawn made between those norms which comprised a current law (lex lata) and those which were formulated with a view to progressive development (de lege ferenda). Otherwise, the entire instrument would lose its value.

36. The selection of topics for consideration by the International Law Commission should reflect the needs of States and of the development of international relations. Since that was how it had generally functioned, the Commission had been able to elaborate conventions in fundamental areas of international law which had played a vital role in international relations. Nonetheless, the scope of traditional codification was gradually narrowing. Some highly political topics, such as the non-use of force, non-interference in internal affairs or self-determination, were not appropriate for consideration by an expert body. Certain special areas, such as the law of the sea, and the laws relating to outer space, aviation and trade, were addressed by conferences and specialized agencies. Therefore, in order to select topics that met the needs of codification and progressive development of international law and that could be accepted by States, it was necessary to strengthen dialogue between Governments and the Commission. The Commission needed further guidance from the Sixth Committee and the General Assembly.

37. The list of topics contained in the report of the Working Group on the long-term programme of work would assist Governments in better understanding the contribution already made by the Commission and would facilitate the selection of topics. Of course, in addition to accepting the topics proposed by the General Assembly or other organs of the United Nations, the Commission could select topics which it deemed appropriate from its own list and begin its preparatory work, once it had obtained the approval of the General Assembly.

38. Of the three topics which the Commission proposed as appropriate for codification and progressive development, the question of the legal effect of

unilateral acts of States was the most relevant and pressing in the contemporary world and should be considered on a priority basis. Nonetheless, the views of Governments would have to be heard before a decision was taken.

39. The Commission's proposals concerning its working methods were extremely relevant and would help to increase the efficiency of its important work. At the same time, she wished to point out that the Commission's working methods and procedures must conform to its mandate and to the needs of the international community.

40. Mr. POLITI (Italy) welcomed the fact that the Commission had completed the second reading of the draft Code of Crimes against the Peace and Security of Mankind, which marked an historic achievement in the development of international criminal law. The draft Code should not take the form of a convention or declaration of the General Assembly before the completion of the work on the establishment of an international criminal court, in order to avoid duplication of efforts. In order to achieve the greatest possible consistency between the two texts, the draft Code should be one of the fundamental documents considered in the discussions on the Statute for an International Criminal Court.

41. Concerning the substance of the provisions of the Code, his delegation agreed with the Commission's decision to restrict the category of crimes against the peace and security of mankind to so-called "core crimes" generally regarded by the international community as extremely serious offenses. He welcomed the inclusion of the crime of aggression, although perhaps the general definition contained in article 16 was not in conformity with the principle of legality. The inclusion of article 19 was justified, since, under certain circumstances, crimes against United Nations and associated personnel affected the international community as a whole. In the light of State practice and relevant precedents, the definitions of genocide, crimes against humanity and war crimes, which included serious violations of the laws and customs of war committed both in international and non-international armed conflicts, were satisfactory.

42. On the question of punishment, it was appropriate that article 3 should contain only general rules, so that the relevant national jurisdiction or the future international criminal court would be free to determine the scale of penalties and impose a particular penalty in each specific case. Nonetheless, his delegation firmly believed that the code should expressly exclude the application of the death penalty.

43. He agreed with the Commission's recommendations on State succession and its impact on the nationality of natural and legal persons. He thought that special priority should be given to the issue of the nationality of natural persons, and that the first reading of the articles should be completed at the forty-ninth session of the Commission or, at the latest, at the fiftieth session. Although the final decision on the form of the draft articles should be taken at a later stage, the suggestion that they should take the form of a declaration of the General Assembly appeared a sensible one.

44. The topic of reservations to treaties went to the very heart of treaty law. While the relevant principles of the 1969 Vienna Convention on the Law of Treaties should be preserved, there was an urgent need to fill the gaps and

clarify the ambiguities in the existing regime. In that context, the Special Rapporteur had rightly focused his report on the aspect of reservations to human rights conventions. The right balance must be struck between the unitary character of the regime of reservations and the specificity of human rights instruments.

45. Two of the three topics identified by the Commission as suitable for codification and progressive development were clearly suitable for future work, namely, diplomatic protection and unilateral acts of States. In both cases it would be useful to produce draft articles and commentaries. By contrast, the issue of the ownership and protection of wrecks beyond the limits of national maritime jurisdiction was extremely specialized and dealt only with one limited aspect of the law of the sea.

46. His delegation agreed with most of the recommendations to improve the Commission's procedures and methods of work, particularly the suggestions that reports should be shorter and more thematic, that the reports of special rapporteurs should be made available sufficiently in advance of the session and that greater use should be made of working groups. The Sixth Committee, meanwhile, should make a more effective contribution to the work of the Commission, so as to give it clear and specific guidance on the various topics.

47. He also supported the proposal that the Commission should revert to a 10-week session, with a possible extension to 12 weeks if necessary. However, he was opposed to splitting the session into two parts, to be held in Geneva and New York. The advantages of such a split were not clear and did not justify the additional costs it would involve.

48. Mr. Choung Il CHEE (Republic of Korea) said he welcomed the completion of the draft articles on State responsibility, contained in chapter III of the report, and noted that article 19 incorporated Nürnberg law and added the crimes of apartheid and massive pollution of the atmosphere or of the seas (para. 3, subparas. (c) and (d)). His delegation endorsed the inclusion of the latter category of crime, which was in line with the changing structure of international law resulting from industrial and technological development. In that connection, it was worth noting that under article 218 of the 1982 United Nations Convention on the Law of the Sea the port State, rather than the flag State, was responsible for punishing the offence of pollution committed by private vessels on the high seas. Thus, the Convention permitted States other than the flag State to exercise universal jurisdiction to punish the offence of polluting the high seas in the same way as the offence of piracy, which was punishable by all nations as an offence against the law of nations.

49. He noted that although article 34 referred to lawful measures of self-defence, it did not define the concept of self-defence, which was an important topic in international relations, as the principle of self-defence was often invoked by States to justify acts of aggression. Although customary international law on the subject had evolved, no satisfactory solution had been found to the problem of defining that concept. Since armed conflicts and acts of aggression were likely to continue in days to come, it was time for the Commission to study that question and clearly articulate and codify that principle, even though defining the concept of self-defence might prove as difficult as defining the concept of aggression.

50. In article 41, the word "immediately" should be inserted after "to cease", since the continuation of a wrongful act should not be tolerated. Regarding countermeasures (chap. III), the draft articles appeared to assume that States resorting to them were acting on a basis of equality, whereas, as some members of the Commission had pointed out, to do so could lead to unjust results when the States concerned were of unequal strength or means. Adequate safeguards should be provided to prevent great Powers from abusing countermeasures to coerce other States.

51. Regarding the task of the Conciliation Commission, his delegation welcomed the inclusion of a fact-finding function as one of its tasks (art. 57, para. 2). Fact-finding was very important in elucidating the truth with impartiality, which was why any obstacles to the effective functioning of that independent commission should be removed. The phrase "except where exceptional reasons make this impractical" should also be deleted, as it might impede the Conciliation Commission in its fact-finding work in the territory of any party to the dispute.

52. Regarding the topic of State succession, considered in chapter IV of the report, his delegation agreed with the priority given to the issue of the nationality of natural persons, and believed that the most important issues in that area were the right to nationality, deprivation of nationality, the right to choose a nationality in cases of State succession and the principle of non-discrimination. People could not be stripped arbitrarily of the individual right to a nationality, nor could they be forced to take on a nationality against their will. On the question of determining people's nationality, he agreed with the Special Rapporteur that the determining factor should be habitual residence. The survey of State practice showed that the recognition of the right of option had been incorporated in customary international law. It was also correct to separate the topic of natural persons from that of legal persons.

53. With regard to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (annex I to the report), his delegation believed that the State of origin should not be allowed to proceed with a potentially harmful activity when consultations did not lead to an agreed solution (art. 17, para. 3). He therefore proposed that the phrase "and may proceed with the activity at its own risk" should be deleted, since if the State of origin was permitted to proceed with an activity that might cause transboundary harm to another State, it would be the latter State, not the State of origin, which would have to assume the risk of transboundary harm. In that connection, it should be pointed out that it was actually the interests of the State exposed to the dangerous activity which should in principle be protected, not the risk of the State of origin. Similarly, with regard to the equitable balance of interests between the State of origin and the affected State (art. 19), the latter should not be obliged to contribute to the costs of prevention (subpara. (e)), as that would be incompatible with the "polluter pays" principle, unless the contribution was made voluntarily. The victims of the harm should be protected in the first place.

54. With regard to reservations to treaties (chap. VI of the report), he agreed with the conclusion that the Vienna regime was generally applicable to all

treaties, including the human rights instruments. His delegation also supported the draft resolution proposed in the Special Rapporteur's second report.

55. Lastly, in the matter of codification, referred to in chapter VII and annex II of the report, diplomatic protection and unilateral acts of States were suitable topics, but not, for the moment, ownership and protection of wrecks beyond the limits of national maritime jurisdiction. His delegation reserved the right to comment on other issues as the deliberations on the Commission's work progressed.

56. Mrs. CUETO MILIÁN (Cuba) underscored the contemporary importance of the topic of State succession and its impact on the nationality of natural and legal persons, since relations of mutual respect among States depended to a great extent on the proper definition of the rights and obligations relating to succession on the part of the new subjects of international law. The establishment of generally acceptable norms concerning the impact of State succession on the rights of the individual, among them the right to a nationality, based on the principle of non-discrimination, was a sine qua non for the promotion and protection of the fundamental rights and freedoms of the human being. It was crucial to establish an overall process guaranteeing uniform regulation of the consequences of State succession. It would also be very useful to draft an instrument setting out general principles pertaining to all situations and norms applicable to specific situations.

57. The topic of international liability for injurious consequences arising out of acts not prohibited by international law was complex, timely and relevant, with broad scope. Unbridled technological development created new challenges and dilemmas in terms of prevention and liability and required recourse to new forms of compensation and reparation. There was no question that not merely States but also individuals were directly responsible for the consequences of dangerous activities not prohibited by international law, which could in many cases have an impact more deplorable and injurious than that of activities identified as causing transboundary harm. It was therefore necessary to draft and codify general principles guaranteeing that States would assume responsibility for the consequences of any damage caused, following the principle that States had to be liable for whatever occurred within their territories, without prejudice to any concomitant civil liability for an act not prohibited by international law. To that end, it would be extremely useful to study and update the list of controlled substances, as a necessary complement to the progressive development and eventual codification of international environmental law. The Commission's work could serve as a catalyst in that regard.

58. Reservations to international treaties remained a matter of great interest to the international community because they provided an effective and necessary means of guaranteeing the universality of international treaties in an increasingly interdependent yet diverse world, both in terms of political thinking and legal doctrines. Global diversity demanded the flexible reservations regime adopted in the 1969 Vienna Convention on the Law of Treaties and in the subsequent legal instruments on the matter. Reservations to treaties were the expression of a willingness and flexibility to negotiate on the part of sovereign States, which were in agreement about giving precedence over any other doctrinal consideration to the possibility of reconciling international legal

thinking with national bodies of law. To question the reservations procedure designed in the Vienna regime would, far from promoting the universality of treaties, result in an excessive restriction on the admissibility of reservations, the free consent of the parties, and the supplementary nature of reservations, which, in the final analysis, was an expression of the same will of States that was reflected in a balanced way in the literal text of the treaties. The reservations procedure should not be approached from a sectoral standpoint, and it was for the parties alone to analyse and agree, in a treaty regime, on the need for reservations in the form of derogating clauses. The treaty bodies also had no role in the matter, for their function was to monitor the implementation of the provisions of the international instruments, on the basis, however, of the principle of free consent of the parties and a recognition that the parties exercised control over their work.

59. The recommendations regarding the mandate and work of the Commission, found in chapter VII of the report, were an important starting point for efforts to revitalize and strengthen the Commission, whose contribution to the United Nations and to the Sixth Committee was and would continue to be indispensable, regardless of whether States made political decisions in given cases to encourage or impede its work. In that connection, it was necessary to improve the Commission's procedure for preparing reports and its consultative role. The new topics proposed by the Commission should be studied exhaustively, especially diplomatic protection and unilateral acts of States.

60. Mr. SHANMUGA SUNDARAH (India) observed that while the Commission had concluded the first reading of the draft articles on State responsibility, important issues still needed to be resolved, like the legality of countermeasures and the conditions under which they could be taken. Countermeasures could give rise to abuse by powerful States, and therefore clarity and precision were required. A Special Rapporteur had indicated that one way of avoiding abuse was to require recourse to binding third-party settlement of disputes as a precondition for initiating countermeasures. Unfortunately, a different approach had been taken in the draft articles; according to article 47, if initial negotiations failed to produce a solution, the injured State could take countermeasures without prior recourse to third-party settlement of disputes, in which case the State against which the countermeasures were taken could resort to binding arbitration.

61. The terms "international crimes" and "wrongful acts" used in article 19 of the draft articles raised important questions because the legality of countermeasures would be dependent on the nature and scope of such crimes and acts. Therefore, the regime proposed by the Commission as a basis for unilateral countermeasures by States should not be used. India was also opposed to a regime of sanctions, particularly the unilateral measures proposed by the Commission in the case of international crimes. Those methods would be no more than a threat and did not contribute to the maintenance of world peace and justice.

62. Regarding international liability for injurious consequences arising out of acts not prohibited by international law, the Working Group was to be commended for having completed draft articles on the prevention of injurious consequences, on the basis of which the Commission could make progress. He agreed with the Commission that, while States were not precluded from carrying out activities

not prohibited by international law, they must notify the risks of harm involved in any activity undertaken in their territory and offer compensation or other relief for the victims of transboundary harm, reflecting the basic legal principle of sic utere tuo ut alienum non laedas.

63. Jurisdictional control or sovereignty over a territory did not per se constitute a basis for the international liability of States, for what was crucial was the actual control of operations taking place within the territory of a State. Therefore, international liability for transboundary harm must be imputed to the operator who was in direct physical control of the activities.

64. The Commission should focus on specific types of activities as a basis for developing draft articles rather than working in the abstract. It seemed neither necessary nor useful to distinguish between "significant" harm and "serious" or "substantial" harm, since they were interchangeable in practice.

65. With regard to the topic of State succession and its impact on the nationality of natural and legal persons, he believed that the Commission should focus on the practice of States in all regions with regard to change in the conferment of nationality at the time of State succession. The objective should be to avoid statelessness. It might also be relevant to consider the effect of State succession on the nationality of legal persons such as corporations.

66. With regard to the topic of reservations to treaties, he believed that the debate over the Vienna regime should not be reopened. The reality of international relations required that it should be left to States parties to determine the legal value of reservations and declarations and thus the legal relationship between States. Furthermore, the Vienna regime should apply to all treaties, including those relating to human rights.

67. Mr. MONTES de OCA (Mexico), referring to the draft articles on State responsibility, said it was regrettable that the draft maintained the distinction between international delicts and crimes, as that raised many questions. The question of countermeasures was also a subject of controversy. Its inclusion in the draft tended to reinforce the inequalities between States and to provide States which had the capacity to resort to countermeasures with one more means of pressure. The use of countermeasures depended on numerous subjective assessments and posed the risk of increasing tensions between States instead of helping to put an end to unlawful conduct. He was therefore in favour of excluding countermeasures from the draft articles, which should be limited to regulating the consequences of wrongful conduct in terms of reparation, satisfaction, guarantees of non-repetition, cessation of wrongful conduct, restitution in kind and compensation, in addition to general aspects of responsibility and dispute settlement. The Commission should use caution in dealing with acts which, taken in isolation, were contrary to international law, but which could be regarded as legal when viewed as a response to an internationally wrongful act. While the Commission's approach to the question of dispute settlement mechanisms was acceptable, greater emphasis should be placed on judicial proceedings and the exhaustion of judicial remedies should be compulsory for all States parties.

68. With reference to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the

principle sic utere tuo ut alienum non laedas was fully recognized in international law. In that context, the Commission had not confined itself to recognizing a clear principle, but had sought to promote its implementation. The development of the procedural norms required in order to give effect to that principle reduced the scope for the exercise of discretion by States.

69. With regard to the procedures and working methods of the Commission, he expressed general support for the conclusions and recommendations contained in paragraphs 148 and 149 of the report, and stressed the importance of improving and strengthening the dialogue between the Sixth Committee and the Commission. The Commission needed to receive more guidelines for its work through the timely transmission of comments and information from States. In that context, the yearly consideration by the Sixth Committee of the report of the Commission was an especially appropriate forum, and the availability of reports before the beginning of the session would facilitate that dialogue. For its part, the Commission should give greater emphasis to the comments received.

70. Lastly, with regard to the Commission's long-term programme of work, while supporting the inclusion of the topics of diplomatic protection and unilateral acts of States, he did not believe that it was appropriate to consider the ownership and protection of wrecks beyond the limits of national maritime jurisdiction, as that topic was being considered in other United Nations forums.

71. Mr. SCHELLENBERG (Observer for Switzerland) agreed with the Commission's conclusion that the progressive development and codification of international law should be improved. To that end, the selection of topics was crucial; it was necessary to bear in mind the reality of contemporary international relations and, in each instance, to question the utility of the undertaking so as not to become bogged down in sterile academic debates. He made the following suggestions in order to expedite the work of the Commission and enhance its effectiveness: (1) Some of the topics could be subdivided and entrusted to various special rapporteurs, whose reports could also be more concise; (2) In some areas, the Commission might resort to outsourcing in respect of both participation in the debates and the preparation of reports; despite the logistical problems involved, an increase in "critical mass" would expedite the work, improve its already high quality and yield more authoritative results; (3) A partial solution to the lack of participation by States might be to reduce the frequency of and streamline the questionnaires; (4) Eliminating the need for a second reading of drafts would expedite the work and reduce the burden on States, which would not have to consider them twice; (5) The consideration by the Sixth Committee of the report of the Commission could be structured thematically, with preference being given to completed draft articles. That would facilitate a genuine debate, rather than monologues; (6) The financial arguments in favour of splitting the Commission's session into two parts, to be held in different cities, did not appear to be convincing, nor should they be decisive. The determining factor should be that members of the Commission should be able to work calmly and without interruptions; to that end, a single session held in one place seemed preferable.

72. With regard to the Commission's long-term programme of work, he believed that the topic of diplomatic protection continued to hold substantial practical interest. In that connection, he had the following comments to make: (1) The preconditions for protection (A/51/10, annex I, add.1, sect. 4) did not mention

the 'clean hands' theory; while that theory referred more to international responsibility than to diplomatic protection, it would be useful to give some consideration to it; (2) The scope of the topic should be limited initially to the protection of natural persons, so as not to waste time on issues about which there was great uncertainty; (3) For the same reasons, consideration of the special cases mentioned by the Commission (individuals in service with the State, stateless persons and non-nationals forming a minority in a group of national claimants) should be set aside for the time being.

73. The topic of ownership and protection of wrecks beyond the limits of national maritime jurisdiction, while well delimited, had been virtually untouched by the efforts to establish an international regime, except in the case of archaeological and other historic objects. For that reason, he believed that the Commission had made an excellent choice and that it might be appropriate to expand the scope of the topic to include wrecks within the limits of national maritime zones, which could also pose serious problems, as in the case of State-owned vessels which sank in the territorial waters of other States.

74. The topic of unilateral acts of States, while complex, had been aptly chosen by the Commission; and he had no comments to make in that regard.

75. Mr. MAHIOU (Chairman of the International Law Commission) reaffirmed that the codification process referred to in the Charter was essentially a dialogue between an expert body (the Commission) and a political body (the Sixth Committee and governments) from which the Commission needed guidelines in the initial phase of its work on each topic. At that stage, the Commission could not describe all the details of a topic, which would emerge from a review of State practice, judicial decisions and other relevant materials.

76. Accordingly, the Commission needed input from the Sixth Committee and from governments, at least on the more important issues, such as those listed in its report (A/51/10, chap. I, sect. H, paras. 22-29). It was also important for the largest possible number of States to reply to the questionnaires transmitted to them by the Commission, for example, on the topic of State responsibility. The contribution of governments was particularly important in an era in which international law was evolving more rapidly than ever before.

77. The CHAIRMAN said that the Committee had concluded its consideration of agenda item 146.

The meeting rose at 1 p.m.

UNITED NATIONS

General Assembly

FIFTY-FIRST SESSION

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SIXTH COMMITTEE
42nd meeting
held on
Monday, 18 November 1996
at 3 p.m.
New York

SUMMARY RECORD OF THE 42nd MEETING

Chairman: Mr. ESCOVAR-SALOM (Venezuela)

CONTENTS

AGENDA ITEM 145: UNITED NATIONS DECADE OF INTERNATIONAL LAW

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The meeting was called to order at 3.10 p.m.

AGENDA ITEM 145: UNITED NATIONS DECADE OF INTERNATIONAL LAW (A/51/278 and Add.1; A/C.6/51/L.6)

1. Mr. HAYES (Ireland), speaking on behalf of the 15 States members of the European Union, of Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Malta, Poland, Romania, Slovakia and Slovenia, and also of Norway, said that in declaring the United Nations Decade of International Law by resolution 44/23, the General Assembly had set itself, and especially the Sixth Committee, a considerable challenge, inasmuch as there was hardly an activity in international life that did not affect, or was not affected by, the workings of international law. Furthermore, in order to be meaningful, the work undertaken pursuant to that resolution had had also to reflect the principles at the heart of the United Nations, according due recognition to the world's principal legal systems, and also taking account of those regional and geographical factors which were central to the principle of universality. There had also been yet another important factor: if the Decade was to be a success, its impact had to be as widespread as possible, appealing not merely to persons who had made their mark in the professions, in diplomacy or in the academic world, but to all the peoples of the United Nations. In that respect, the Decade was already a success, as could be seen from the wide range of activities chronicled in the report of the Secretary-General (A/51/278 and Add.1).

2. Broad acceptance and implementation of a comprehensive convention in an important field of international law was clearly a development that facilitated acceptance of and respect for international law. The European Union therefore welcomed the ever-growing number of ratifications of and accessions to the 1982 United Nations Convention on the Law of the Sea and the steps taken during the past year with regard to the institutions for which it provided. The International Seabed Authority had taken up its functions; on 18 October 1996 the International Tribunal for the Law of the Sea had been inaugurated in Hamburg; and progress was being made towards establishment of the Commission on the Limits of the Continental Shelf. The European Union was also grateful to those organizations that had reported on initiatives with regard to promotion of the peaceful settlement of disputes, and, in particular, to the Permanent Court of Arbitration.

3. The European Union acknowledged the fundamental role of the International Law Commission in the progressive development of international law and its codification. As could be seen from the Secretary-General's report, several other bodies were also making valuable contributions to development and codification, including the Council of Europe's Committee of Legal Advisers on Public International Law and, in the field of international trade, the United Nations Commission on International Trade Law. The European Union also welcomed the work done in the Preparatory Committee on the Establishment of an International Criminal Court on the elaboration of a draft statute, and would continue to take an active part in that ongoing work.

4. The European Union had noted with special interest the activities undertaken by several international organizations and bodies to encourage the teaching, study, dissemination and wider appreciation of international law. Those activities included the circulation by the International Committee of the Red Cross of revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict, as foreseen in resolution 49/50. The European Union recalled with pleasure the gathering in New York in March 1995 of some of the most distinguished jurists and practitioners from the world's different systems on the occasion of the United Nations Congress on Public International Law, as well as the colloquium held at the Peace Palace in The Hague in October 1996 to mark the fiftieth anniversary of the International Court of Justice. The Union looked forward to the publication of the proceedings of both those events, and commended the Selection Committee of the Hague Fellowship Programme, which had awarded some 18 fellowships in the period under consideration.

5. The Secretariat, and in particular the Treaty Section of the Office of Legal Affairs, were to be congratulated on their work in facilitating dissemination of treaty information, and for converting the compendium Multilateral Treaties Deposited with the Secretary-General and the United Nations Treaty Series to an electronic database. The availability of the compendium on the Internet was to be welcomed, as was the on-line availability of the Treaty Series, which was also due to become available on the Internet in the near future, thanks to an initiative by Australia.

6. The European Union had noted with interest the proposals put forward by the Netherlands and the Russian Federation in document A/C.6/51/L.6, concerning action to mark the 1999 centennial of the first International Peace Conference and the closing of the United Nations Decade of International Law. It welcomed the suggestion that preliminary discussions should be held on substantive plans and arrangements, and that the cooperation of the International Court of Justice, the Permanent Court of Arbitration and relevant international organizations should be sought. As the Decade moved into its closing years, the European Union reaffirmed its wholehearted support for the Decade's objectives and activities and looked forward to its further achievements.

7. Mr. LAVOYER (Observer for the International Committee of the Red Cross (ICRC)) said that the main objectives of the United Nations Decade of International Law were closely associated with his organization's own efforts to promote, disseminate and bring about respect for international humanitarian law. Since its address to the Sixth Committee at the previous session, ICRC had continued its work to clarify the content of international humanitarian law and to ensure its continued adaptation to the conditions of modern warfare, with particular emphasis on its applicability to United Nations peacekeeping and enforcement operations, on rules applicable to war at sea, and on the prohibition of anti-personnel mines and blinding laser weapons. ICRC had also increased its endeavours and improved its methods for dissemination of and training in international humanitarian law, among other things, by opening a World Wide Web site on the Internet.

8. Efforts had been made to spread knowledge of the guidelines for military manuals and instructions on the protection of the environment in times of armed

conflict, concentrating in particular on helping States to promote broad circulation of their content and to consider the possibility of incorporating them in their respective military instruction manuals, as invited by General Assembly resolution 49/50. ICRC had also been developing a model manual for the armed forces on the law of armed conflicts, designed primarily for use by senior officers with tactical responsibilities, and intended as a reference tool for the military commander without legal background. Its use would facilitate the incorporation of humanitarian law norms, including environmental protection norms, in the operational decision-making process.

9. Recent debate about the unacceptable effects of anti-personnel mines had had little to say about their negative impact on the environment. Yet landmines were one of the most widespread, lethal and long-lasting forms of pollution the world had yet encountered, rendering large tracts of land unusable for decades after conflicts, and thus intensifying the use and environmental degradation of other available land. ICRC reaffirmed its support for a total ban on the production, stockpiling, transfer and use of anti-personnel landmines.

10. The major challenge facing international humanitarian law was implementation: there was a blatant contrast between the highly developed rules of humanitarian law, many of which were universally accepted, and the repeated violations of those rules in conflicts around the world. A first periodical meeting of States parties to the 1949 Geneva Conventions, to be convened by Switzerland, the depository of the Conventions, would consider some of the general problems regarding the application of international humanitarian law. ICRC was actively involved in recent developments regarding the repression of war crimes, and had welcomed the establishment of the two ad hoc tribunals for Rwanda and the former Yugoslavia. Nevertheless, it saw the establishment of those tribunals as only part of a broader process that should culminate in the establishment of an independent and impartial permanent international criminal court. In that context, ICRC reiterated its wish to see the adoption of a definition of war crimes that would include violations committed during non-international armed conflicts.

11. With a view to improving national implementation of international norms, ICRC had set up a new unit within its Legal Division, the Advisory Service on International Humanitarian Law, which had become operational in early 1996. The Service was decentralized in structure, and worked to raise Governments' awareness of the need for implementing measures, providing specialist advice and promoting an exchange of information and experience, with due regard to the specific requirements of States and their respective political and legal systems. In its first 10 months of activity, the Service had assisted the authorities of more than 10 countries in drafting laws for the repression of war crimes and the protection of the emblem of the red cross or red crescent. In addition, 14 national seminars on national implementation had been held worldwide in 1996, and in October 1996 a meeting on national commissions for the implementation of international humanitarian law had been held in Geneva.

12. ICRC had considered for some time that further clarification was needed of the rules applicable to situations insufficiently or not at all covered by treaty law. The twenty-sixth International Conference of the Red Cross and Red Crescent had entrusted it with the task of preparing, with the assistance of

experts representing various geographical regions and legal systems and in consultation with experts from Governments and international organizations, a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts. A first meeting between ICRC and legal experts had taken place in June 1996, and a study was now in progress. ICRC hoped that Governments would lend their support to that demanding project, which fell squarely within the framework of the Decade.

The meeting rose at 3.45 p.m.